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IN THE

Supreme Court of the United States

October Term, 1933.

No. 290

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, SUCCESSOR TRUSTEE TO THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,

Petitioner,

vs.

THE CITY OF NORWALK, OHIO,

Respondent.

BRIEF OF PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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THE WILKINSON-SLOAT PRINTING CO., BRIEF AND RECORD PRINTERS
1213-17 JACKSON ST., TOLEDO, O. PHONE MAIN 6787

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A.

OPINIONS BELOW

The opinion of the District Court for the Northern District of Ohio, Western Division (filed February 7, 1931) is not officially reported. It is printed at pages 211-239 of the record.

The opinion of the Circuit Court of Appeals for the Sixth Circuit (filed March 17, 1933) is found at pages 572-576 of the record and is reported in 63 Fed. (2) 911.

B.

JURISDICTION ON CERTIORARI

A petition for rehearing was filed in the Circuit Court of Appeals on April 15, 1933, within the time provided by

the rules of that court (R. 577), which was denied May 18, 1933 (R. 639). The jurisdiction of this court is based upon 43 Statutes 938, (Judicial Code, Sec. 240) as amended by the Act of February 13, 1925, U. S. C., Title 28, Sec. 347. This court granted the petition for writ of certiorari Oct. 9, 1933. (R. 640)

C.

STATEMENT OF THE CASE

Primary and Ultimate Questions

The petitioner, by virtue of various mergers is the successor trustee and mortgagee of all the properties, franchises and rights of the Ohio Electric Power Company (an Ohio public utility corporation) in the City of Norwalk, Ohio, respondent (R. 277, 278), which were conveyed to the original mortgagee by a Supplemental Mortgage dated May 25, 1925 (filed for record at Norwalk with the Recorder of Huron County, Ohio, June 19, 1925) (R. 412) prior to the acts and assertions of claims by the respondent City, on account of which petitioner's immediate predecessor, The Equitable Trust Company of New York, filed this action in the District Court for theNorthern District of Ohio, Western Division, on January 3, 1930. A total of Two Million Six Hundred Thousand Dollars ($2,600,000) of bonds issued by Ohio Electric Power Company are outstanding under theMortgage and Supplemental Mortgage, of which about One Hundred Thirty Thousand Dollars ($130,000) were issued and sold in 1925 upon the basis of the Norwalk properties, including the Norwalk franchises (R. 184, 191).

The rights of petitioner and the bondholders represented by it were acquired prior to a suit in quo warranto filed May 19, 1926, in the Court of Appeals of Huron County, Ohio, and carried on at the instance of the re-

spondent City against the mortgagor Power Company, resulting in an ouster decree against the Power Company, *State of Ohio, ex rel, Martin v. Ohio Electric Power Company,* 35 O. App. 481, affirmed June 12, 1929, 121 O. S. 235, 167 N. E. 877. *Neither petitioner nor any other representative of the bondholders was a party to the quo warranto case, or were served with process or represented in that suit, all of which appears from petitioner's bill and is admitted by the city's answer.* (R. 13, 43)

The enforcement of the quo warranto decree would destroy entirely all that substantial portion of petitioner's security under the mortgage represented by the value of the properties of Ohio Electric Power Company located in the City of Norwalk, Ohio. There would be substantially a loss of One Hundred Eight Thousand Dollars ($108,000). (R. 119). The full amount of the bonds, a part of which were based on the Norwalk properties and franchises, could not have been sold had it been a fact that the company had no franchise rights to operate in Norwalk. (R. 187, 188).

The primary question is whether petitioner can and should have a day in court for the determination of its rights as mortgagee of these franchises. The ultimate question is as to its right to an injunction to protect its rights in and lien upon the franchises and property of the Ohio Electric Power Company in the City of Norwalk against wrongful destruction by the respondent, City of Norwalk.

The Judgments Below

(1) District Court.

The petitioner's predecessor, the Equitable Trust Company of New York, contending that it was the mortgagee of valid and existing perpetual franchises held by

the mortgagor Power Company to use the streets and public places of the respondent City, brought this suit in the Federal District Court for an injunction restraining the respondent City and its representatives from interfering by force (theretofore actually used and further threatened, as the District Court found, R. 237) with the exercise by the Power Company of its franchise rights, and also restraining the respondent City from taking any steps to procure the enforcement of the judgment of ouster, which the City (in the name of the State of Ohio) had obtained against the Power Company in the State Courts of Ohio in the quo warranto suit. The District Court (Judge Hahn) held that the Power Company had valid and existing franchises derived from the State of Ohio and not from the City, and in accordance with the prayer of petitioner's predecessor, enjoined the respondent City and its representatives for so long as the petitioner or its successors or the holders of bonds under the Mortgage and Supplemental Mortgage should have any interest in or lien upon the properties and franchises of the mortgagor Power Company in the City of Norwalk.

(2) Circuit Court of Appeals.

Upon appeal by the respondent City, the Circuit Court of Appeals held by a two to one decision (Judge Hicks dissenting, but filing no separate opinion):

(a) That the proceedings in the Federal District Court came within the inhibitions of Judicial Code, Sec. 265 (28 U. S. C., Sec. 379), in that the effect of the decree was to stay the quo warranto proceedings in the State Courts, *notwithstanding the fact that the final decree in the State Courts had been entered before this suit was filed; and notwithstanding that the petitioner was not a party to the state court case.*

(b) *That, notwithstanding that the present petitioner was not a party to the quo warranto proceedings and the decree therein was not an adjudication against petitioner,* nevertheless a court of equity was without authority to enjoin its enforcement at the instance of the petitioner for the protection of petitioner's rights in the franchise as mortgagee thereof, in the absence of a showing that the decree was void as to the Ohio Electric Power Company, or that it had been obtained by fraud or accident by the City of Norwalk, or that it had been rendered by the court upon a mistake of fact, and in the absence of a further showing that the petitioner did not have timely knowledge of the quo warranto proceeding, or that the petitioner could not have intervened therein; and that the petitioner failed to make the required showing. (Record, pp. 575-6)

The Federal District Court held (contrary to the result in the quo warranto action in the State Courts) that the Ohio Electric Power Company had valid franchises, and that petitioner had a valid lien thereon. *These questions were not passed upon by the Circuit Court of Appeals.*

Division of the Issues

The specifications of assigned errors which are to be urged necessarily fall into two groups, pages 20-21 infra. The issues raised by the first group, specifications I, II and III, relate to those errors which we claim because of the action of the Circuit Court of Appeals in denying petitioner a day in court by dismissing the bill *without passing upon the questions as to the source, nature and extent of the franchise rights and petitioner's interest therein, and right to protection thereof.* The second, which is covered by specification IV, relates to our claim that the court below erred in not sustaining petitioner's claim with respect to the source, nature and extent of the franchise rights and

petitioner's interest therein and right to protection thereof.

We understand that this court, if it finds that the court below erred in dismissing the bill without passing upon the questions with respect to the franchises and petitioner's interest therein, may either enter a decree of reversal, and remand the case to the court below for a consideration of all the issues conformably to the decision of this court, or may itself proceed to a determination of all the issues and enter a final decree. Therefore, for the convenience of the court, we mark a division of the statement of the case at this point. The essential facts for the consideration of the first group of errors assigned have been stated above, so that if this court desires, its attention may at once be directed to the argument relating to the first group of errors assigned beginning at page 21 infra. That portion of the statement of the case immediately below, pages 6 to 20, has to do more particularly with the facts bearing upon the petitioner's claim that its mortgagor is possessed of perpetual franchises derived from the State of Ohio upon which petitioner has a valid lien which should be protected against threatened destruction by the respondent city.

Further Facts

The respondent City, located in Huron County, has been a city since about April 4, 1881 (R. 38), with a population from 1890 to the present varying between 7,000 and 8,000 people (R. 280), and without substantial change in its territorial extent (R. 52, 60).

Early in 1890 a partnership, styled "The Norwalk Incandescent Light Company," was formed by six men for the purpose of generating and furnishing electricity in the City of Norwalk (R. 51, 211), the partners intending to organize a corporation, turn over their rights to it and take

stock therein in proportion to their respective interests (R. 60, 61, 65). The representatives of the partnership told the City Council what they proposed to do (R. 61).

On October 7, 1890, upon application of the partnership, the City Council passed an ordinance entitled "An Ordinance to Amend an Ordinance Entitled, An Ordinance to Grant Certain Privileges as Therein Set Forth to The Incandescent Light Company of Norwalk, Ohio, Passed July 30, 1890". The substantive part of the ordinance (Exhibit B to Second Amendment and Supplement to Bill of Complaint, R. 36) reads as follows:

> "Section 1. That the Norwalk Incandescent Light Company, of Norwalk, Ohio, its successors and assigns are hereby granted, for the term of twenty years from the passage of this ordinance, the right of way through, in and upon the streets, sidewalks, alleys and public grounds of said city for the use and purpose of therein and thereon erecting, maintaining and using all necessary poles or posts of wood, iron or other suitable material, and the necessary wires successfully to operate and use a system of incandescent lighting in said City—Provided that the said company its successors or assigns shall maintain and use under reasonable restrictions and rules said poles or posts and wires. That said posts or poles and wires on Main street in said city shall be at least twenty feet high, and of the usual height otherwise and be so placed as not to interfere with the travel upon such streets or other places nor with any ornamental or shade trees without the consent of the owners thereof or of the city Commissioner and provided further that all those parts of such streets or other public places in erecting said poles or wires, shall be kept and maintained in good order by said Company its successors and assigns, and provided further that said posts and wires shall be so placed as not to interfere with the flow of

water in any drain or gutter of said city. The points for the location of such poles or posts shall be determined under the direction of the Street Commissioner of said Council. *This grant of way is not exclusive* and the said Council reserves the power to grant similar powers to other parties whenever in its opinion it deems it advisable so to do, but such right shall not be used so as to interfere with any rights hereby granted." (Italics ours).

The ordinance of October 7, 1890, was identical with the ordinance of July 30, 1890, except that it did not specify a particular system of incandescent lighting to be used (R. 36). The ordinance was accepted by the partnership immediately (R. 62, 63, 212). The partnership shortly after July 30, 1890, set about the erection of a plant for the generation of electricity, and a distribution system throughout the City was put into operation shortly after October 7, 1890, supplying the City with light for its streets and public buildings and the inhabitants of the City with current for domestic and commercial use (R. 53, 212). The same system of pole lines carried direct current wires for current to light the streets and alternating current wires for electricity for domestic and commercial use (R. 57, 212). This system of pole lines, including extensions by the construction of two high tension lines, one one-fourth and one three-fourths miles in length, respectively, and other shorter extensions (R. 78, 80, 82, 84) and necessary replacements, is now operated by Ohio Electric Power Company, petitioner's mortgagor (R. 64, 277, 279) for supplying alternating current to the inhabitants of the City for domestic and commercial use.

A complete chain of title covering all properties, franchises and rights in the City of Norwalk from the partner-

ship formed in 1890, including any and all additions thereto down to and including petitioner's mortgagor, Ohio Electric Power Company, through all its predecessors appears from the record. The following table gives the names of the various owners and operators of the properties, rights and franchises, with the respective periods of operation, and dates of incorporation where the latter is important:

Name.	Period of Operation	Date of Incorporation
The Norwalk Incandescent Light Company (Partnership)	October, 1890, to March 7, 1891	
The Incandescent Light & Power Company (Corporation)	March 7, 1891 to Feb. 25, 1893	Mar. 7, 1891
J. W. Foster and F. H. Jones, Assignees	Feb. 25, 1893 to March 7, 1895	
George P. Jones and Mayme C. Foster	Mar. 7, 1895 to May 20, 1895	
The Northern Electric Company (Corporation)	May 20, 1895 to June 28, 1897	May 17, 1895
The Northern Gas & Electric Company (Corporation)	July 16, 1897 to May 8, 1900	
The Norwalk Gas & Electric Company (Corporation)	May 8, 1900 to Feb. 14, 1903	
The Cleveland & Southwestern Traction Company (Corporation)	Feb. 14, 1903 to Feb. 5, 1907	

The Cleveland Southwestern & Columbus Railway Company, (Corporation)	Feb. 5, 1907 to April 30, 1924	
The Cleveland Southwestern Railway & Light Company, (Corporation)	April 30, 1924 to Dec. 31, 1924	
Victor Emanuel	Dec. 31, 1924 to May 22, 1925	
Ohio Electric Power Company, (Corporation)	May 22, 1925 to Present	Aug. 12, 1924

We shall allude only to such corporations, contracts and other facts in sequence from 1890 to the present time as appear material upon the contentions of the parties.

In March, 1891, The Incandescent Light & Power Company, a corporation, was formed, its Articles of Incorporation containing the following purpose clause:

> "3. The purpose for which said corporation is to be formed is for the furnishing of the citizens of Norwalk and vicinity electric lighting of both arc and incandescent, electric and steam power and steam and electricity for heating for profit." (R. 282).

The incorporators, with the possible exception of one man, were identical with the members of the partnership known as The Norwalk Incandescent Light Company (R. 60, 65), which thereupon transferred all of its property, including whatever rights were given by the ordinance of October 7, 1890, to the corporation by written bill of sale (R. 54, 62, 212). The City Council, upon application of the partners, confirmed their action in transferring all the partnership property to the corporation. (R. p. 62). The corporation continued the operation of the generating plant and

distribution system in the same manner as it had been conducted by the partnership (R. 55, 213).

On May 17, 1895, The Northern Electric Company, with its location and principal business to be transacted at Norwalk, Ohio, was incorporated for the purpose, all as stated in its articles, as follows:

> "Said corporation is formed for the purpose of manufacturing and producing electricity for light, heat and power." (R. 289).

The Northern Electric Company, succeeding to the title to all the properties, rights and franchises of its predecessors, proceeded with the operation of the system in the same manner as theretofore, and on July 16, 1895, entered into a written contract with the respondent City to light the streets and public buildings for ten (10) years, commencing September 1, 1895 (R. 214). The contract provided that the company should build and keep in operation for the period of ten (10) years a first class electric light plant. In addition to the purchase price of Thirteen Thousand Five Hundred Dollars ($13,500) for the properties and rights acquired, The Northern Electric Company expended Twenty-five or Thirty Thousand Dollars in the construction of a new plant (R. 72), with the understanding that the company, by virtue of its incorporation under state laws, possessed a continuous right to serve private consumers without interruption on the part of the City (R. 73); otherwise the plant would not have been built (R. 75, 76), an understanding which was a correct interpretation of the law of Ohio as it then existed (see discussion of Ohio Statutes and decisions pp. 50 to 70 infra). The formation of this company was discussed with the City officials beforehand and the new plant was double the capacity required to furnish energy for both the public and private.

needs of the City (R. 68). The generating plant as it now stands is capable of caring for the entire requirements of the Norwalk customers of Ohio Electric Power Company, but as the company now brings current into the City over a high tension line, the generating plant is used only for standby or emergency purposes.

The public lighting contract of July 16, 1895, nearing expiration by its terms on August 31, 1905, The Cleveland & Southwestern Traction Company and the respondent City on April 13, 1905 entered into a public lighting contract to begin September 1, 1905, (Defendant's Ex. H; R. 541). During the period of this contract, the Power Companies continued to use the same system of poles and wires which had been constructed originally, with such additions as were made thereto, direct current wires being used for street lighting and alternating current for furnishing current to public buildings and private individuals, both sets of wires being on the same system of poles (R. 64, 72, 132).

This contract is too lengthy to be quoted in full herein, but reference is made to it by reason of the contention by the respondent City that it terminated all rights of the predecessors of Ohio Electric Power Company in the City as of August 31, 1915. An examination of this contract, which appears at pages 541-551 of the record, demonstrates that it was concerned solely with public lighting and did not undertake to deal with the rights of the company to use the streets and public places for the purpose of serving private consumers. The provisions of this contract will be discussed in some detail in the course of the argument. At the request of the respondent City, service for lighting streets and public places was continued by the Power Company after the expiration date of the contract until January 1, 1916, when the City put into operation a municipal plant (R. 87, 88). Since then all public lighting has been

supplied from the municipal plant. Ohio Electric Power Company and predecessors have continued to serve private consumers.

During the Fall of 1914, conferences were held between the City officials and officers of The Cleveland Southwestern & Columbus Railway Company, then operating the plant and system in the City. Mention is made of these conferences here because the respondent City has claimed that the company requested a new franchise to operate a system in the City to commence August 31, 1915, on which date the public lighting contract of April 13, 1905, would expire, and because the respondent City has seemed to take the position that the company indicated thereby its feeling that it had no rights in the City after August 31, 1915. It was claimed by the respondent City that a newspaper account of such conferences, printed at pages 503-510 of the record, showed that the company was suggesting that a contract with the City for a period of ten (10) years be made, with the right on the part of the City to terminate the same at the end of any year and take over the company's plant at its appraised value. It is plain from the newspaper article in question that any proposals considered related only to changes in operations during the period prior to the expiration of the contract of April 13, 1905, as is also shown by a letter directed by the company to the Mayor (Plaintiff's Ex. 81; R. 510). A request for a twenty-five (25) year franchise submitted by Mr. C. J. Taylor employed by the company and withdrawn by him on January 20, 1914, was made without any authority from his superior officers or the Board of Directors, and was withdrawn upon the instructions of his superiors as soon as they learned of it (R. 83).

On July 1, 1924, the Council of the respondent City enacted an ordinance regulating the construction and maintenance of "all electric light and power wires, telephone, signal and trolley wires in operation in the corporate limits of the City of Norwalk, Ohio," (Plaintiff's Ex. 38; R. 438). The Cleveland Southwestern Railway & Light Company, one of the predecessors of Ohio Electric Power Company was then operating its system in the respondent City, and continued to do so subject to and in accordance with the provisions of this ordinance, which regulated in detail the mode of use of the streets and public places by electric light and power companies. The record shows that the respondent City called upon Ohio Electric Power Company repeatedly to comply with this ordinance and that the company did comply (Plaintiff's Exs. 51 to 61, 63, 66, R. 127-130; R. 457-469.) This ordinance has never been changed and it remains in effect as admitted in the answer of the respondent City (R. 48).

Petitioner's mortgagor, Ohio Electric Power Company, as stated above, was organized August 12, 1924, and on May 22, 1925, by conveyances from Victor Emanuel, acquired the plant and distribution system, together with all rights and franchises in the City of Norwalk (Plaintiff's Exs. 22, 23, 24 and 25; R. 335, 358, 360, 363). Prior to that transfer Ohio Electric Power Company had executed its Mortgage and Deed of Trust to Seaboard National Bank of the City of New York, predecessor of petitioner, (Plaintiff's Ex. 28; R. 379), and on May 25, 1925, the company executed its Supplemental Mortgage and Deed of Trust conveying all of its properties "and also such other contracts, franchises, rights, privileges, and agreements of the grantor in the City of Norwalk, Ohio." to secure such first mortgage bonds as might be issued under the original Mortgage and Deed of Trust (Plaintiff's Ex. 29; R. 412).

One Hundred Thirty Thousand Dollars ($130,000) Series A 6½% Bonds of an aggregate of Nine Hundred Forty-nine Thousand Dollars ($949,000) of that series were issued in 1925 upon the basis of the Norwalk properties, including the franchises (R. 186, 187; Plaintiff's Exs. 31, 32; R. 425, 428), and the Norwalk properties are included in the security for all other bonds issued, the total now outstanding being Two Million Six Hundred Thousand Dollars ($2,600,000). The bonds were purchased by A. C. Allyn & Company, Bankers, and sold by them to the public under two prospectuses containing letters from Victor Emanuel, Vice President of Ohio Electric Power Company to A. C. Allyn & Company, in which the franchises were referred to as follows:

> "The franchises under which the Company operates are satisfactory in form and without burdensome restrictions. The Company's properties are operated under the jurisdiction of the Public Utilities Commission of Ohio and the issuance of these bonds has been authorized by the Commission." (Plaintiff's Exs. 78 and 79; R. 489-496; R. 184-191)

Each prospectus also contained three specific references to the Norwalk property of the Ohio Electric Power Company and the business conducted in that City, and A. C. Allyn & Company in purchasing the bonds understood that the above quoted statement applied to the Norwalk property as well as other properties of the company and by virtue of the letter relied upon the company's having satisfactory franchises to operate in Norwalk without burdensome restrictions. (R. 186, 187, 188). The quoted statement was based upon a written opinion of the then Ohio counsel of Ohio Electric Power Company to the effect that the company had the right to continue its operation

in the City of Norwalk in the same manner and to the same extent as its predecessors had operated. (Plaintiff's Ex. 76; R. 478, R. 179-183.) Resale of the bonds by A. C. Allyn & Co. could not have been effected but for the inclusion of the above quoted statement in the prospectus. (R. 188).

On March 23, 1926, the Council of the respondent City passed a resolution in terms requiring the Ohio Electric Power Company to remove from the streets, alleys and other public places of the City its electrical equipment within thirty (30) days (Plaintiff's Exs. 41, 42; R. 444-446.) On May 18, 1926, the Council, upon non-compliance with the foregoing resolution, passed a resolution ordering that complaint be filed with Edgar G. Martin, Prosecuting Attorney of Huron County, Ohio, requesting him to take such legal steps as might be provided by the laws of Ohio in quo warranto proceedings to oust the Ohio Electric Power Company, *and this resolution further expressly engaged Edgar G. Martin as Prosecuting Attorney, Charles Suhr as City Solicitor of Norwalk, and G. Ray Craig to do all things necessary in quo warranto proceedings for the ouster of the Ohio Electric Power Company, so that the quo warranto proceedings were initiated and carried on at the instance of the respondent City* (Plaintiff's Exs. 44, 45; R. 448, 449). The quo warranto suit was filed on May 19, 1926 and carried on with the result as stated above, page 3.

While the quo warranto action was pending, counsel for the City and for Ohio Electric Power Company entered into an agreement that the City would not interefere with the operations of the company and the company would not attempt to extend its lines until the quo warranto case should be decided by the State Court of Appeals. (R. 104)

While this agreement between counsel was in effect, City employees under the direction of Mr. Irvin, Superintendent of Electricity and Water of the City, proceeded

as the District Court found "surreptitiously and practically in the night time in removing nine or ten poles" of the Power Company in the early morning of October 26, 1927 (R. 237) The District Court further found from Mr. Irvin's own testimony that he was in close touch with the situation and must have known of the agreement of counsel that there should be no interference with the property of Ohio Electric Power Company, pending the litigation in the State Courts, that Irvin was keen to prevent competition of the company with the City in the commercial lighting business, that the situation and feeling evidenced by the acts and conduct of Mr. Irvin had not been aided or allayed by the litigation in the trial court, and the District Court therefore came to the conclusion, as was fully warranted by the evidence, that unless an injunction issued there would be further interference with the property of the Power Company. That the action of Mr. Irvin and the employees under his direction was upon the direct authority of the Director of Public Service of the City, was entirely clear from the directions contained in a letter written by Irvin to the local telephone company at Norwalk which carried the approval of the Director of Public Service, (Plaintiff's Exhibit 62, R. 466) and from the testimony of Webster and Irvin (R. 140, 155). Plaintiff's testimony also showed that upon the occasion in question three transformers of Ohio Electric Power Company were removed and that the wires were left hanging within a few feet of the ground while carrying their usual load of electricity, thus creating a severe hazard. (R. 97, 98, 106 and 126).

The findings of the District Court referred to above, with reference to the necessity of an injunction to prevent further destruction by force of the property of Ohio Electric Power Company at the instance of the respondent City,

have further support from the fact that upon the same day that the bill of complaint in this case was filed, Mr. E. F. Boxell of counsel for the petitioner called upon Mr. G. Ray Craig of Norwalk, who had been, as above stated, employed by the City to assist in conducting the quo warranto case. Mr. Boxell stated to Mr. Craig that the bill of complaint had been filed, that he regarded Mr. Craig as chief counsel for the City of Norwalk in the quo warranto case, and accordingly made the suggestion to Mr. Craig that the temporary injunction then in force against the City in the case pending in the Court of Common Pleas of Huron County, Ohio, be permitted to remain in effect pending a hearing upon this case in the United States District Court. The injunction in the Court of Common Pleas had been secured by counsel for the Company immediately upon their learning of the activity of the city employees on the morning of October 26, 1927 in removing poles and transformers of Ohio Electric Power Company. Upon this occasion Mr. Craig stated definitely that although he had just then learned of the bill of complaint filed in this action, that so far as he was concerned Ohio Electric Power Company would receive no further favors from the City of Norwalk, and as he stated, "we" will oust the Ohio Electric Power Company from the City of Norwalk as soon as possible (R. 107, 115). This is undisputed. And it is equally clear from the testimony of Mr. Pruner who was present at the interview between Mr. Craig and Mr. Boxell that Mr. Craig assumed to express for the City the attitude that no favors would be granted. (Pruner R. 107-112).

From the incorporation of the Incandescent Light and Power Company in 1891 until the passage of the ouster resolution March 23, 1926 (Plaintiff's exhibit 42, R. 445), no objection was made by the respondent City to the occupancy of its streets and public places by the Power Com-

pany and its predecessors in title. *In fact no objection has ever been made by the City upon the ground that the mode of use of its streets and public places was not in accordance with that prescribed by the City Council.* Over the period mentioned, the Power Company and its various predecessors made additions and improvements to the plant and equipment, and extensions and changes in the various lines, and expended large sums of money in doing so. In 1895 the Northern Electric Company built a new plant costing at least $25,000 over and above the investment of $13,500 in the existing property acquired from its predecessors (R. 72). In the period from 1910 to 1916, the Cleveland, Cincinnati and Columbus Railway Company expended a minimum of between $20,000 and $25,000 for improvements, maintenance and repairs to the distribution system (R. 78, 81).

Following the acquisition of the system by Ohio Electric Power Company, that company spent between $18,000 and $20,000 for replacements, betterments and repairs (R. 94, 99). In each of the years from 1911 to 1929, both inclusive, Ohio Electric Power Company and its respective predecessors were assessed for payment of taxes upon all their property situated in Norwalk, which taxes were paid, and the respondent City received its share of all taxes collected upon real and personal property located within its limits (Plaintiff's Exhibit 1, R. 279, 280.) There exists joint use of poles by the municipal system and Ohio Electric Power Company which had been the situation for many years previous to the time for trial (R. 92, 152). An ordinance authorizing such joint use was passed January 4, 1916 (Plaintiff's Exhibit 37, R. 436.) All of the foregoing facts were well known to the City. The occupancy of the city streets and public places has at all times been open and notorious, and the operation of the privately

owned plant and system has been continuous from 1890 to the present time.

D.

SPECIFICATION OF THE ASSIGNED ERRORS WHICH ARE INTENDED TO BE URGED

I.

The Circuit Court of Appeals erred in holding that the injunction violates Judicial Code Section 265.

II.

The Circuit Court of Appeals erred in not holding that the Petitioner as the mortgage trustee was entitled to a hearing on the merits of its case on the showing made that it was not a party to the quo warranto proceedings, that it had a pre-existing lien on the Norwalk franchises and properties of Ohio Electric Power Company, and that the enforcement of the state court judgment would irreparably injure its property rights therein.

1. The quo warranto decree is void and inconclusive as to petitioner.

2. Petitioner was entitled to maintain this suit unembarrassed by the quo warranto decree.

3. Although, as above stated, the petitioner is entitled to a readjudication in the federal courts of the facts and law determined in the quo warranto proceedings, in fact its case, as presented to the courts below, rests upon vitally different facts and theories of the law from those presented by the Company in the quo warranto suit.

III.

The Circuit Court of Appeals erred in not holding that the questions as to the existence of the franchise

rights and petitioner's interest therein should be determined according to the law of Ohio as established by its Supreme Court at the time the mortgage was made and the bonds were issued in reliance thereon, which was prior to the quo warranto suit—the further effect of the decision below is to impair the obligation of the franchise contracts and petitioner's contract made in reliance upon the franchise contracts, and results in the taking of petitioner's property without due process of law in violation of the federal constitution.

IV.

The Circuit Court of Appeals erred in not holding that petitioner is the mortgagee under its mortgage and supplemental mortgage from Ohio Electric Power Company of perpetual franchises to use the streets and public places of Norwalk which Ohio Electric Power Company's predecessors, The Incandescent Light and Power Company and The Northern Electric Company, respectively, derived from the State of Ohio by incorporation under the statutes in effect between 1887 and 1896, and in not affirming the decree of the District Court granting an injunction for the protection of petitioner's rights.

E.

ARGUMENT

The topical index at the front of this brief constitutes a summary of the argument.

I.

THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE INJUNCTION GRANTED BY THE DISTRICT COURT VIOLATES JUDICIAL CODE SECTION 265.

The final decree of the District Court enjoins the

"* * * City of Norwalk, Ohio, its attorneys, officers,

officials, agents, employes and representatives and all persons, whomsoever, to whom notice of this order shall come, * * *"

(1)

"* * * from in any manner interfering with or interrupting the full exercise of any and all of said franchise rights of the Ohio Electric Power Company * * *"

and from

"* * * doing any act to dismantle, wreck or remove any part of said existing system * * *"

and (2)

"* * * from taking any steps or action of any kind whatever to cause the enforcement or carrying out by the Sheriff of Huron County, Ohio, or any of his deputies, or by any other officers of any of the courts in the State of Ohio of the judgment of ouster entered by the Court of Appeals of Huron County, Ohio. * * *" (R. 241, 242)

so long as the bondholders' rights remain in existence. The Circuit Court of Appeals regarded the latter part of the injunction as operating directly upon the Court of Appeals of Huron County, Ohio.

1. The Injunction is Directed Only Against the City and Persons Acting For It.

We respectfully submit that the Circuit Court of Appeals misconstrued the order of the District Court. The decree is directed only to the City of Norwalk and those acting for the City to prevent the City and its representatives from taking steps or filing applications to move the State Courts to enforce the quo warranto decree. The in-

junction does not run against the State Courts or their officers.

Marshall v. Holmes, 141 U. S. 589, at pages 599, 600:

> "These authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, which is none the less an original, independent suit, because it relates to judgments obtained in the court of another jurisdiction. While it cannot require the state court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. *A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court. It would simply take from him the benefit of judgments obtained by fraud.*" (Italics ours)

2. After Final Judgment in State Court Judicial Code, Section 265, Does Not Inhibit Injunction Against Unconscionable Use Thereof.

The injunction granted by the District Court is not directed against proceedings in the State Court quo warranto action, which had long since terminated, but it denies to the respondent City unconscionable use of that judgment. As the petitioner was not a party to the quo warranto proceedings, to leave the City free to enforce the quo warranto judgment to the injury or destruction of petitioner's lien upon the franchises and property of the power company would be just as unconscionable, as to leave it free to do so, if petitioner had been a party to the quo warranto proceeding and a judgment had been obtained against it by fraud, accident or mistake therein. This court, as we

understand the decisions, has clearly held, under such circumstances, that Judicial Code, Section 265, has no application, *Simon v. Southern Railway,* (1915) 236 U. S. 115:

> "But when the litigation has ended and a final judgment has been obtained—and when the plaintiff endeavors to use such judgment—a new state of facts, not within the language of the statute may arise." (p. 124)

Essanay Film Co. v. Kane, (1922) 258 U. S. 358:

> "But when the litigation in the state court has come to an end and final judgment has been obtained, the question whether the successful party should in equity be debarred from enforcing the judgment, either because of his fraud *or for the want of due process of law in acquiring jurisdiction, is a different question, which may be passed upon by a federal court without the conflict which it was the purpose of the Act of 1793 to avoid.*" (p. 360). (Italics ours)

3. Petitioner is Entitled to Protection by Injunction Against Destruction of its Rights in the Norwalk Franchises and Properties Either Threatened by Force or by Unconscionable Enforcement of the Quo Warranto Decree.

No suggestion has ever been made that the injunction in its other important phases, namely in enjoining the City and its representatives from using force to remove or cause the destruction of the properties of petitioner's mortgagor in the City, operates upon the State Courts. That there was imminent danger of damage to the properties by force, the District Court expressly found (R. 237). The case stands here with that finding unimpaired by anything contained in the opinion of the Circuit Court of Appeals. Even if the injunction (contrary to our view) could be considered in any phase as operating directly upon the State Courts,

it is submitted that the Circuit Court of Appeals could and should only have modified the language so as to remove any doubt as to the scope thereof, or should have remanded the case to the District Court with instructions to do so instead of ordering the dismissal of petitioner's bill.

The Circuit Court of Appeals, while recognizing that the decree of the District Court was broad enough to enjoin the City and its agents from forcibly removing the wires and poles (R. p. 573), summarily thrust this feature of the case to one side, and took the view that the whole purpose of the suit was to stay the hand of the State Court in enforcing the ouster decree. We respectfully submit that in so doing, the court below did not give due regard to the findings of the District Court, which, as observed, stand unimpaired by the Circuit Court of Appeals' decision. The District Court found:

> "* * * The court is of the opinion that, unless restrained and enjoined by this court, there will be further interference with the property of the Ohio Electric Power Company pending litigation in the Federal Courts.
>
> * * * The plaintiff is entitled to an injunction which, it is hoped, will prevent similar acts and a repetition of like conduct on the part of the City." (R. p. 237)

The trial court was in position to observe the witnesses and sense the strong feeling current among the officers of the respondent City, and as the Circuit Court of Appeals for the Sixth Circuit has held in *City of Toledo v. Toledo Railways & Light Company*, 259 Fed. 450, at pages 453 and 454:

> "* * * Where the trial court has seen and heard the witnesses, we are always reluctant to set aside its finding of fact; and especially must that be true

> where the rightfulness of the conclusion depends largely upon that general knowledge possessed by all citizens of the community, including the judge, and which cannot be reproduced in the printed record. What action the city, through its official representatives, was likely to take, could be determined by the trial judge much better than by us, and, upon a review of the proofs and the arguments here, we see no occasion to disturb his conclusion."

The decision of the court below, if permitted to stand, would thus leave the case in such position that petitioner and the rights of the bondholders represented by it would be left absolutely at the mercy of the City, not only to destroy those rights by seeking enforcement of the ouster decree, but free to proceed by self help and force to remove the properties of petitioner's mortgagor, in spite of the fact that both the requisite Federal and equity jurisdictions, unhampered by any inhibition of Judicial Code Section 265, are present. We submit, therefore, that the decision of the court below in disregarding the necessity for an injunction against self help by the City, as well as against unconscionable use of the quo warranto decree, is wholly untenable.

II.

THE CIRCUIT COURT OF APPEALS ERRED IN NOT HOLDING THAT THE PETITIONER AS THE MORTGAGE TRUSTEE WAS ENTITLED TO A HEARING ON THE MERITS OF ITS CASE ON THE SHOWING MADE THAT IT WAS NOT A PARTY TO THE QUO WARRANTO PROCEEDINGS, THAT IT HAD A PREEXISTING LIEN ON THE NORWALK FRANCHISES AND PROPERTIES OF OHIO ELECTRIC POWER COMPANY, AND THAT THE ENFORCEMENT OF THE STATE COURT JUDGMENT WOULD IRREPARABLY INJURE ITS PROPERTY RIGHTS THEREIN.

The purely federal jurisdiction is of course present in this case, based both upon diversity of citizenship and the claimed violations of constitutional guaranties. It must be recognized, as stated in the case of *Simon v. Southern Railway, supra,* that a showing of federal jurisdiction is not alone sufficient to support the injunction. A proper equitable basis must be demonstrated. In other words, a Federal Court has the same power to enjoin any unconscionable use of a judgment of a State Court that any State Court would have. *Simon v. Southern Railway, supra; Union Railway Company v. Illinois Central Railway Company* (C. C. A. 6 ,1913) 207 Fed. 745. The State Courts of Ohio exercise this jurisdiction. See *Anderson v. Anderson,* 8 O. 108, enjoining the enforcement of a foreign judgment; *Wood v. Stanberry,* 21 O. S. 142, enjoining execution under a void judgment; and *Place v. Sweetzer,* 16 O. 142, *enjoining enforcement of a judgment against property of one not a party to the action.*

The Circuit Court of Appeals announced the proposition that in order to justify federal courts in restraining the respondent city from enforcing the quo warranto decree *one* of the following conditions must be shown; (a) the necessity of protecting federal court jurisdiction properly

acquired and subsisting; or (b) that the state court decree was void as between the parties thereto; or (c) fraud, mistake or accident in the procuring of the state court judgment; plus denial of notice and opportunity to be heard in the state court action, i. e., that petitioner had no knowledge of the state court proceedings until after final judgment therein, or could not have appeared in those proceedings to assert its rights and defenses.

In so holding, we respectfully submit that the court below committed at least two errors. The first of these errors was in holding that the state court decree must be shown to have been void *as between the parties to the state court litigation,* instead of holding that the state court decree must be shown to be void or not conclusive as to the plaintiff in the federal suit. The second error was in holding that the plaintiff in the federal suit, not having been made a party defendant in the state court action, must nevertheless affirmatively establish that it had no casual or extra judicial notice of the pendency of the state court proceedings until after final judgment therein, or that it could not have appeared in those proceedings to assert its rights and defenses.

We shall herein undertake to establish that the federal court plaintiff in such a suit, as that at bar, is entitled to protection against a state court judgment rendered in a case to which it was not a party, and which, if enforced, will injure or destroy its pre-existing property rights, and that in such a suit as this it is of no importance whatever whether the federal court plaintiff had casual or extra judicial notice of the pendency of the state court proceedings, or whether it could have intervened therein and have asserted its rights. In short, we shall establish that it is the well settled law that in such cases the federal court plaintiff may have relief, although it has seen fit deliber-

ately to ignore the state court porceedings and to rely solely and purposely upon its right to later protection in the federal courts. We shall establish this, although, as we shall also show, the present record does not disclose that the present petitioner or its predecessor had even such casual or extra judicial notice or any opportunity to make any such choice of forums.

Moreover, it appears as a matter of law from the nature of quo warranto under the Ohio statutes that petitioner could not have intervened as of right in the quo warranto suit, even though petitioner had known of that action before final judgment therein.

1. Quo Warranto Decree Void as to Petitioner.

The proposition that the enforcement of a void state court judgment even against one actually named a party to the state court case but not validly served will be restrained by the federal courts regardless of Section 265 of the Judicial Code, as we understand it, is undisputed. *Simon v. Southern Railway,* supra, and *Atchison Railway Co. v. Wells,* (1924) 265 U. S. 101. That a mortgagee can not be deprived of his security in franchises by a proceeding directly impeaching their validity and duration without being made a party thereto, and hence as to petitioner the quo warranto decree is void, see: *Old Colony Trust Co. vs. Omaha* (1913), 230 U. S. 100; *Louisville Trust Co. v. Cincinnati,* (C. C. A. 6 1896), 76 Fed. 296, 299; *United Sheet & Tin Plate Co. v. Hess* (C. C. A. 6, 1908) 159 Fed. 889.

However, under the opinion of the majority of the Circuit Court of Appeals it appears that a distinction must be made in the application of this rule between a case where one is made a party to the state court action and not served, and a case such as that at bar *where one is neither made a party nor served with notice.*

The opinion of the Circuit Court of Appeals permits relief to be given in the first case even though the state court defendant had actual (but not legal) notice of the state court proceedings, and paid no attention thereto, but holds that in the present case the state court judgment against the Power Company is conclusive and binding upon the present petitioner and that it can have no relief, *although it and its predecessor Trustee were neither named as a party nor served with process in the state court case.*

We submit that no such distinction exists, and that the judgment in the second type of case is for all purposes as void and inconclusive as to the mortgagee not made a party as the judgment in the first example, and that the inequitable use of such judgment should be restrained without requiring any showing upon the part of the mortgagee that it was unaware of the State Court proceedings until after final judgment, or could not have intervened therein to protect its rights.

2. Petitioner Was Entitled to Maintain This Suit Unembarrassed by the State Court Quo Warranto Decree.

a. Supporting Federal Authorities.

In *Old Colony Trust Co. v. Omaha,* (1913) 230 U. S. 100, the situation was like the case at bar in every essential characteristic bearing upon the point, except that there the prior suit was in equity in which the mortgagee might have intervened. There in the prior suit which was brought by the mortgagor, the utility company, against the City in Federal Court, the City had obtained a final decree dismissing the bill and sustaining as valid a city ordinance, the enforcement of which would cut away the rights of the Trustee, which decree had been affirmed by the Circuit Court of Appeals, and the case was pending upon appeal

by the mortgagor company to the United States Supreme Court, when the later suit was brought in Federal Court by the Trustee (Mortgagee) against the City for an injunction against the enforcement of the ordinance. Hence the suit in reality was one to enjoin the City from making an unconscionable use of the prior decree.

The record in that case (which we have obtained and examined minutely) shows not only that the Trustee was not made a party to the prior suit, but there was no proof or showing by the Trustee in its own suit that it did not at all times know of the pendency of the prior suit or that it could not have intervened therein, and there was no showing of any of the other conditions, one of which the Circuit Court of Appeals for the Sixth Circuit has said is essential as a basis for relief in this case. Furthermore, in the Old Colony case the contention was made, as in the case at bar, that the second suit was nothing more than an attempt to relitigate the issues which had been presented in the prior suit. This court in that case said at page 122 of the opinion:

> "A prior suit by the Electric Company against the City, largely but not entirely like the present, resulted in a decree against the Electric Company. The City now takes the position that that decree is conclusive upon the Trust Company as mortgagee. But the law is otherwise. *The Trust Company's rights, and those of the bondholders whom it represents, were not acquired during or since that suit but long prior thereto, and the Trust Company was not a party to it. This being so, the Trust Company is free to maintain the present suit, unembarrassed by the decree in the other.* Keokuk & Western Railroad Co. v. Missouri, 152 U. S. 301, 313; Louisville Trust Co. v. Cincinnati, 76 Fed. Rep. 296." (Italics ours)

If an attempt be made to distinguish *Old Colony Trust Co. v. Omaha,* supra, upon the ground that Judicial Code, Section 265, was not there involved, a complete answer is that Section 265 has no bearing on the present inquiry, which is whether or not a showing is necessary by a plaintiff in a suit like the one at bar that it had no knowledge of the prior suit or opportunity to seek protection of its rights therein.

The most recent pronouncement of this court upon the point, we believe, is found in *American Surety Company v. Baldwin,* (Nov. 14, 1932) 287 U. S. 156, at page 164:

> "The Surety Company was at liberty to resort to the federal court regardless of citizenship, because entry of the judgment without notice, unless authorized by it, violated the due process clause of the Fourteenth Amendment, compare National Exchange Bank v. Wiley, 195 U. S. 257; Cooper v. Newell, 173 U. S. 555. *And it was at liberty to invoke the federal remedy without first pursuing that provided by state procedure.* Simon v. Southern Ry. Co., 236 U. S. 115; Atchison, Topeka & Santa Fe Ry. Co. v. Wells, 265 U. S. 101; Firestone Tire & Rubber Co. v. Marlboro Cotton Mills, 282 Fed. 811, 814." (Italics ours)

In *Atchison Ry. Co. v. Wells;* supra, 265 U. S. 101, where Wells, a Colorado citizen, had sued the Santa Fe in Texas, and had secured a writ of garnishment to a Texas Railway Company, but was not able to make personal service upon the Santa Fe in Texas, and the Santa Fe received notice by personal service on one of its officers in Kansas of the Texas suit in time to have appeared therein, it was contended that the Federal Court plaintiff should have entered into the State Court action and there should have asserted its rights. This court held the injunction re-

straining the enforcement of the judgment as void was proper, and said:

> "The Santa Fe was not obliged to assert its rights in the courts of Texas. Compare Firestone Tire & Rubber Co. v. Marlboro Cotton Mills, 282 Fed. 811, 814." (pp. 103, 104).

Nor would it have been enough to justify the decision of the court below even had the petitioner learned by any chance extra judicial notice, that questions as to the franchise rights were being adjudicated in the then pending quo warranto suit in the state court in which petitioner was not made a party or served with process.

Coe v. Armour Fertilizer Works, (Fla. 1915) 237 U. S. 413:

> "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In Stuart v. Palmer, 74 N. Y. 183, 188, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said: 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court." (pp. 424, 425).

Western Union Telegraph Co. v. Tompa (C. C. A. 2, 1931) 51 Fed. (2d) 1032, was a suit by the Telegraph Company to enjoin Tompa from prosecuting an action in the New York Supreme Court against the New York Central Railroad Company, Tompa having been injured on a rail-

road car while working for the Telegraph Company on premises of the New York Central Railroad Company, the Telegraph Company having a standing agreement to indemnify the railroad against any claims on account of such injuries, and Tompa having agreed with the Telegraph Company not to sue the Railroad Company on account of any such injuries, but to look to the relief plan of the Telegraph Company or Workmen's Compensation. *The Telegraph Company had notice of the pending suit in the state court.* Though the federal court refused to issue an injunction against the proceedings in the state court, *it did enjoin the plaintiff therein from enforcing any judgment she might obtain.* As against the contention that the Telegraph Company should have asserted its rights in the state court, the Circuit Court of Appeals of the Second Circuit said:

> "The prosecution of the defendant's pending suit is in violation of her agreement with the plaintiff, and the plaintiff has no adequate remedy at law. *Even if we assume that the plaintiff has a remedy in an independent action in equity in the state court or, without deciding, by petition to intervene in the now pending suit, such a remedy does not deprive it of the right to seek redress in this action, curtail the power, or do away with the duty of a federal court to grant relief within the limits, and to the full extent, of its own jurisdiction.* Simon v. Southern Railway Co., supra; Hyde & Oglesby v. Stone, 20 How. 175, 15 L. Ed. 74." (p. 1034) (Italics ours)

See also *Firestone Tire and Rubber Co. v. Marlboro Cotton Mills,* (C. C. A. 4, 1922) 282 Fed. 811, certiorari denied 260 U. S. 749, referred to by this court in *Atchison Ry. Co. v. Wells,* supra, which involved a situation directly analogous to the case at bar.

The same situation arose in *Ballard & Ballard Company v. Munson Steamship Line* (C. C. A. 6,—1928) 25 Fed. (2d) 252, certiorari denied 278 U. S. 611. Judgment was obtained by default in a state court of Kentucky against the Steamship Line. It was void because the Steamship Line was not doing business in Kentucky and the agents served were not its agents. The Steamship Line learned of the default eleven days after it was taken and under Kentucky law the judgment did not become final for forty-nine days thereafter. Although the Steamship Line made no attempt to go into the state court action and assert its rights, the court affirmed the issuance of an injunction restraining the state court plaintiff from enforcing the judgment.

In *Postal Telegraph Co. v. Newport* (1918), 247 U. S. 464, this court held that a decision of the state court, which denied asserted federal rights through the application of a former state court judgment would not conclude this court, if such application was clearly inconsistent with the right of due process of law. We submit that the principle announced by this court at page 476 of its opinion applies here.

> "* * * The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. Windsor v. McVeigh, 93 U. S. 274, 277; Louisville & Nashville R. R. Co. v. Schmidt, 177 U. S. 230, 236; Simon v. Craft, 182 U. S. 427, 436. And as a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard (Pennoyer v. Neff, 95 U. S. 714, 733; Scott v. McNeal, 154 U. S. 34, 46; Coe v. Armour Fertilizer Works, 237 U. S. 413, 423), *so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment*

against one who is neither a party nor in privity with a party therein.'' (Italics ours)

In a case where the requisite federal jurisdiction is present, as here, the long established rule that the federal courts will make an independent determination of the true meaning of applicable state statutes and law under the circumstances of this case, as we understand, still has the sanction of this court.

Moore-Mansfield Const. Co. v. Electrical etc. Co., 234 U. S. 619;

Tidal Oil Co. v. Flanagan (1924), 263 U. S. 444.

As was said in *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349, at page 360:

> ''* * * So, when contracts and transactions are entered into and *rights have accrued under a particular state of the local decisions, or when there has been no decision by the state court on the particular question involved,* then the Federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the right of parties accrued.'' (P. 360) (Italics up to first comma are ours).

and in *Louisville Trust Co. v. City of Cincinnati, supra,* the Circuit Court of Appeals below recognized this rule in the following language:

> ''* * * The special fact, therefore, which justifies us in determining for ourselves the true meaning and validity of the Ohio statutes and city ordinances, out of which the rights of this complainant spring, is the fact that it is a citizen of another state, and that the contract under which it has acquired an interest originated prior to the judicial opinion relied upon as foreclosing our judgment.''

b. Authorities Relied Upon by Circuit Court of Appeals.

Expressions will be found in the cases relied upon by the court below to the effect that the federal court plaintiff must have been free from fault or negligence, but this is stated generally. *Not one of those cases denies relief upon the ground that mere failure to apply for leave to intervene in the state court action by one not in privity with the defendant after extra judicial notice constitutes negligence barring relief in equity.* Those cases show, we think, that none of them is a precedent for any such rule as the court below applied against this petitioner.

In *National Surety Company v. State Bank* (C. C. A. 8, 1903), 120 Fed. 593, injunctive relief was properly granted because of failure to get actual notice, due to unavoidable accident. In *Denton v. Baker* (C. C. A. 9-1899), 93 Fed. 46, there was privity so that the party necessarily was concluded by the result in the state courts. In *Brown v. County of Buena Vista* (1877), 95 U. S. 157, relief was denied because the federal court plaintiff had been served in the prior case and its allegations of fraud were not proved, and it was guilty of laches. In *Knox County v. Harshman* (1890), 133 U. S. 152, the ground of the decision was that fraud could not be proved and that service upon the county in the prior suit was regular. In *Marshall v. Holmes* (1891), 141 U. S. 589, the case came before this court on error to review an order denying removal from the state court, and although the petition did allege that fraud was not discovered until after judgment, we submit no rule was announced requiring the federal court plaintiff to prove that she had no notice of the prior suit or could not assert her rights therein. In fact, we maintain these cases support our position. See especially *Marshall v. Holmes,* at page 596, where this court approved the settled doctrine that:

> "* * * 'any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court at law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.' * * *"

3. Petitioner Could Not Have Intervened as of Right in the Quo Warranto Suit—Petitioner Was Not Negligent.

Even if the view of the court below that petitioner was bound to make a showing that it had no extra judicial notice or knowledge of the pendency of the state court proceeding or could not have intervened therein and hence could not have obtained relief in the state court, be accepted as generally applicable, we submit that the record in the case as it stands satisfies the requirement for the further reason, that petitioner could not have intervened as of right in the quo warranto suit even if it had known about it in time.

The procedure in quo warranto actions is regulated strictly by statute (General Code of Ohio Sections 12303-12344, printed in the appendix to our brief in support of our petition for certiorari) 104 O. S. 120. The sections of the Ohio Code governing the procedure in quo warranto are exclusive, and the other general sections of the code with reference to actions and proceedings have no application. The quo warranto sections make no provision by which petitioner could have intervened in the quo warranto suit to obtain any relief therein.

That petitioner could not have intervened therein as a

matter of right, see *Toledo Traction Light & Power Co. v. Smith,* (1913), District Court, Northern District of Ohio) 205 Fed. 643, where it is said by Judge Killits:

> "* * * In the first place, the statutes of Ohio do not award an action in quo warranto as a matter of right. * * *. It would seem to us that the remedy by quo warranto is therefore not quite complete, where the party interested must appeal to the discretion of some other person or body." (p. 662.)

Concededly, if petitioner had no standing to go into the quo warranto suit other than a questionable right to appeal to the discretion of the state court (for the effect of this *see Coe v. Armour Fertilizer Works,* supra,) the instant case is not only brought squarely within the rule of *Wells Fargo & Co. v. Taylor,* (1920) 254 U. S. 175, where the bill alleged that the express company had not been in any wise "negligent or at fault", and other cases relied upon by the court below, but it likewise is brought squarely within the very letter of the proposition enunciated by the court below, when it says there must be a showing by petitioner either that it had no notice of the state court proceeding *or could not have asserted its rights therein.* If this be true in the case of a void judgment against a named defendant, it must be all the more so in this case where petitioner was not even named as a party to the state court suit.

4. Negligence, if Any, Was That of Respondent City.

Moreover, the record affirmatively shows that if there was negligence upon anyone's part, it was upon the part of the City. The supplemental mortgage was filed for record in the Recorder's office on June 19, 1925, which was long prior to the passage of the ordinance directing the filing of the quo warranto proceedings. Thus the City

knew that the Trustee under the mortgage had a claim to the franchise of the Ohio Electric Power Company, if one existed. Section 12310 Ohio General Code provides:

> "All persons who claim to be entitled to the same office or franchise may be made defendants in one action, to try their respective rights to such office or franchise."

That the City engineered the quo warranto suit and was the real party plaintiff is clear. (Plaintiff's Ex. 45, R. 449) This court, we are confident, will look behind the nominal plaintiff to see who is the real plaintiff. *Miller vs. The State,* 79 U. S. 159. As the City saw fit to ignore the rights of the petitioner under the mortgage in the quo warranto proceedings, we submit it is unconscionable that the petitioner residing in a distant state should be presumed nevertheless to have learned of the City's action against the Power Company, and now be held to have lost its rights as a result of the proceedings in the quo warranto case. This amounts to saying that the City by deliberately omitting to include the Trustee under the mortgage in the quo warranto case, nevertheless obtained the same rights against the Trustee that it would have obtained, if the Trustee had been included in those proceedings and had had its day in court therein, a proposition which has never heretofore had the sanction of any court.

5. Petitioner's Bill Should Not Have Been Dismissed in Any Event Without Affording Petitioner an Opportunity to Show That it Had no Knowledge of the Quo Warranto Proceedings Until After Final Judgment Therein.

In reaching a result based upon what it regarded as an important question in the case, namely, whether plaintiff had been negligent in not seeking relief in the state court

quo warranto case, we respectfully submit that the Circuit Court of Appeals should not have entered an order dismissing the bill, but in the interests of justice, should have remanded the case, with instructions to the District Court to receive evidence from both parties on the question as to whether petitioner had been guilty of any negligence barring relief in equity. The decision of the court below appears to go upon the basis that on the present record it may be presumed that petitioner had knowledge of the pendency of the quo warranto proceedings in time to have asked and obtained as a matter of right, leave to intervene therein, and that petitioner was negligent in not doing so. We think we have shown that petitioner would not have had any right to intervene, and that it would not have been guilty of negligence in not making any such attempt, even if it had possessed knowledge of the pendency of that action. However, since there is no suggestion either in the pleadings or the evidence that petitioner had any such knowledge prior to the entry of final judgment in the Supreme Court of Ohio, we respectfully submit that if this court should be of the opinion that such knowledge without an attempt to intervene would constitute negligence, then it is only proper and just to require that evidence be taken upon the point. To demonstrate that this would not be a futile proceeding, and that if the respondent had raised the point in the district court, such evidence could have been produced, and that it can still be produced, we secured affidavits from the various officers and counsel of the petitioner, who were in charge of the mortgage trust in its behalf, copies of which were appended to the petition for rehearing in the court below. (Affidavits, R. 628-638) They show that petitioner had no notice of the quo warranto action until in the summer of 1929, subsequent to the Supreme Court decision on June 12, 1929.

That a remand for that purpose on such showing would be a proper exercise of discretion, see—

Panama Mail S. S. Co. v. Vargas, 281 U. S. 670;

U. S. v. Rio Grande Dam & Irrigation Co., 184 U. S. 416;

Chicago, Milwaukee & St. Paul Ry. Co. v. Tompkins, 176 U. S. 167;

Columbus Gas & Fuel Co. v. Columbus (C. C. A. 6) 55 F. (2d) 56;

Wilson v. Spencer, (C. C. A. 5) 261 F. 357;

Lee v. State Bank & Trust Co., (C. C. A. 2) 38 F. (2d) 45.

6. The Circuit Court of Appeals Erred in Holding That This Suit is Merely an Attempt to Relitigate the Same Issues of Fact and of Law Which Were Present in the Quo Warranto Suit.

In view of the fact that the court below has assumed to treat this case as tantamount to an effort to review the proceedings in the quo warranto action in the State courts, upon the ground of error in the State Court decree, it becomes important to note the vital distinctions between the two cases and to analyze the State Court decision (although even if the issues of fact and law *were* identical, since the parties are different, the federal courts, as we have shown, are free to adjudicate the issues for themselves.)

Briefly stated, the case at bar was presented upon a widely different theory and a far different line of evidence from that employed by the Power Company in its defense of the quo warranto suit.

The applicable statute in effect during the period from 1887 to 1896, when the power company's predecessors were incorporated provided for an agreement between the city

and the utility as to the "mode of use" of the city streets.

The case at bar was presented upon the theory, that there was at all times an agreement as to the mode of use of the city streets between the Ohio Electric Power Company and its predecessors and the City (whereas the defense in the quo warranto suit was upon the basis that there was no evidence one way or another as to the agreement on mode of use); that the Company and its predecessors continued to observe the mode of use so agreed upon with the acquiescence and consent of the City at all itmes; that due to the expenditure of considerable sums of money upon the system in the City and the payment of taxes by the Company and its predecessor, of which the City received its proportion, the City was estopped to deny the existence of any agreement as to mode of use or the existence of the franchise rights; and that the passage of an ordinance by the City in 1924 regulating the use of the streets by the Company, as well as by other utiilties, with which the Company complied completely at the direction of the City, amounted at once to a modification of the mode of use and (if that were necessary) to a consent to the continued use of the streets by the City and an estoppel against the City from asserting that the Company was not using the streets with the Ciy's consent in a manner approved by the City. All of these vital elements and others were lacking in the presentation of the defense of the Ohio Electric Power Company to the quo warranto action in the state courts. (See more detailed analysis of the quo warranto decision, infra pp. 68 to 70).

Hence we maintain, that not only are the quo warranto decisions inapplicable here, but upon the vitally different record in this case, we would expect a decision from the state courts like that of the district court.

If, contrary to the foregoing analysis, the quo warranto decision is to be deemed a declaration of the State law of Ohio that the municipality and not the State had the power to grant the franchise and place limitations upon the same in point of time, such declaration is a reversal of the State law of Ohio, as declared in the earlier decisions rendered before the bondholders' money was invested in reliance upon the security afforded by franchises acquired under the State law of Ohio, as declared in the earlier decisions, and to prevent injustice and hardship, the Federal District Court was right, under the rule of this court, announced in *Gelpcke v. City of Dubuque*, and many other decisions, infra, in following the earlier line of cases. See the discussion immediately below.

III.

THE CIRCUIT COURT OF APPEALS ERRED IN NOT HOLDING THAT THE QUESTIONS AS TO THE EXISTENCE OF THE FRANCHISE RIGHTS AND PETITIONER'S INTEREST THEREIN SHOULD BE DETERMINED ACCORDING TO THE LAW OF OHIO AS ESTABLISHED BY ITS SUPREME COURT AT THE TIME THE MORTGAGE WAS MADE AND THE BONDS WERE ISSUED IN RELIANCE THEREON.

While the Circuit Court of Appeals recognized in its opinion that the quo warranto decree was not an adjudication against the petitioner, the effect of the decision of the court below by its denial to petitioner of a day in court is practically the same, as if the court below had held the quo warranto decision to be a reversal of the law of Ohio as previously declared by its Supreme Court in reliance upon which the rights of the petitioner and the bondholders were acquired, and had decided that the later decision of the state supreme court should be followed in passing

upon the questions as to the franchise rights, rather than the earlier decisions in reliance upon which petitioner's rights were acquired.

In so holding we respectfully submit that the court below erred i ntwo important respects: first, it should have determined the rights of petitioner and the bondholders according to the law of Ohio as established by its Supreme Court at the time the bonds were issued, which was prior to the quo warranto action; and, second, the effect of the decision by the court below is to impair the obligation of the franchise contracts and petitioner's contract made in reliance upon the franchise contracts, and results in the taking of petitioner's property without due process of law in violation of the Federal Constitution.

1. Petitioner is Entitled to Have its Rights Determined According to the Law of Ohio as Established by its Supreme Court at the Time the Bonds Were Issued, Which Was Prior to the Quo Warranto Suit.

At the time petitioner's predecessor, *The Equitable Trust Company of New York,* acquired its rights under the mortgage on May 25, 1925 and the bonds were sold, as the District Court correctly found, (as we expect to show infra), it had been definitely established in Ohio by an unbroken line of decisions by the State Supreme Court and by this court that electric light and power companies organized between 1887 and 1896 under the facts present in this case obtained from the State of Ohio valid perpetual franchise rights. (See discussion, pp. 50 to 70, infra.)

The decision of the Circuit Court of Appeals in refusing to consider the franchise questions operates to give the quo warranto decision conclusive effect as a judicial repudiation of the law of Ohio, as previously declared by its Supreme Court and by this court in cases brought up from

Ohio, in reliance upon which the bondholders represented by petitioner invested their money. That the result is to deprive petitioner of its vested property rights without due process of law is clear.

A change of law by judicial decision in effect depriving an investor of a contract or property right (which would be the result under the decision below) is as abhorrent to justice as such a change of law by legislative act, as was long ago announced by this court, in *Gelpcke v. City of Dubuque* (1863), 1 Wall. 175.

The hardship upon the bondholders who acquired their bonds in 1925 upon the strength of a clear cut line of applicable decisions of the Ohio Supreme Court is obvious, if their rights can be destroyed by a subsequent change of attitude upon the part of that court. Under such circumstances, as we understand the decisions, this court following the rule in the *Gelpcke case* has often reiterated that in a case where federal jurisdiction is present, federal courts should hold themselves free to decide what the state law was and to enforce it as laid down by the State Supreme Court before the contracts were made, rather than under the later decisions.

Moore-Mansfield Construction Co. v. Electrical Installation Company (1914), 234 U. S. 619:

> "Courts of the United States are courts of independent jurisdiction, and when a question arises in a United States court as to the effect of a change in decision which detrimentally affects contract rights and obligations entered into before such change, *such rights and obligations should be determined by the law as judicially determined at the time the rights accrued.* In every such case the federal courts, while leaning to the view of the state court as to the validity or interpretation of a law of the State, will exercise an independent judgment

and will not necessarily follow state judicial decisions rendered subsequently. Burgess v. Seligman, 107 U. S. 20, 33; Loeb v. Columbia Township, supra." (P. 625) (Italics ours).

Tidal Oil Company vs. Flanagan (1924), 263 U. S. 444:

> "* * * *In such cases the federal courts exercising jurisdiction between citizens of different States held themselves free to decide what the state law was, and to enforce it as laid down by the State Supreme Court before the contracts were made rather than in later decisions.* * * * In such cases, as a general rule, they, in the interest of comity and uniformity, followed the decisions of state courts as to the state law, *but where gross injustice would be otherwise done, they followed the earlier rather than the later decisions as to what it was.*" (P. 452) (Italics ours)

And see also *Great Northern R. R. Co. v. Sunburst Oil & Ref. Co.* (1932), 287 U. S. 358, 364; 77 Law Ed. 153, 157.

The rights of the petitioner here clearly come within the category of intermediate transactions entered into upon the faith of the earlier line of cases, and we submit, are entitled to the protection of the federal courts, because the decisions in Ohio very clearly express the preference for the principle of forward operation, rather than that of relation backward, and particularly because it is necessary to do so to avoid injustice and hardship. *Thos. v. State of Ohio ex rel Gilbert*, 76 O. S. 341; *Lewis v. Symmes*, 61 O. S. 471.

2. The Effect of the Decision Below is to Impair the Obligation of the Franchise Contracts and Petitioner's Contract Made in Reliance Upon the Franchise Contracts, and Results in the Taking of Petitioner's Property Without Due Process of Law in Violation of the Federal Constitution.

As before stated the city council, on March 23, 1926 passed an ordinance requiring the removal of all of the equipment of The Ohio Electric Power Company from the streets of Norwalk (Plaintiff's Ex. 42, R. 445). On May 18, 1926 an ordinance was passed requesting the Prosecutor of Huron County to bring an action in quo warranto for the ouster of Ohio Electric Power Company (Plaintiff's Ex. 45, R. 449). The later ordinance did not refer to the earlier one which is still in effect.

Defendant has at no time denied its intention to enforce the ordinance of March 23, 1926 and it is obvious that it will undertake to proceed under that ordinance unless it is enjoined from doing so. Except for the injunction granted by the District Court, there is nothing to prevent the city from acting upon the ordinance of March 23, 1926 at any time it may see fit. Thus the effect of the decision below is to leave the city free to act under the ordinance.

While the respondent may take the position that the ordinance of March 23, 1926 taken in conjunction with the ordinance of May 18, 1926 exhibits only an intent upon the part of the city to follow orderly processes of litigation to determine the rights of Ohio Electric Power Company and therefore do not constitute laws impairing the obligations of contract, it is plain that these ordinances do not indicate an intention to follow orderly processes of litigation with reference to the rights of this petitioner and the bondholders represented by it, for none of them was ever made a party to the quo warranto litigation.

That the action of the Norwalk council in enacting these ordinances amounted to action by the state within the provisions of Section X, Article I of the Federal Constitution is clear. *St. Paul Gas & Light Company v. St. Paul,* 181 U. S. 142, 148; *Ross vs. Oregon* 227 U. S. 150, 163 and *Northern Ohio Traction Company v. Ohio,* 245 U. S. 574, 583, 584.

The respondent below took the position upon the basis of *Des Moines v. City Railway,* 214 U. S. 179, that the only threat of injury to petitioner's rights arose from the ouster decree. The Des Moines case was, of course, between the city and the utility and it was there held that the threat of judicial proceedings directed against the utility did not constitute action impairing the obligation of a contract so as to confer Federal jurisdiction. That case, as we understand it, did not decide whether such a threat would justify injunctive action on the merits. The Des Moines case, by reason of the vital difference in the two situations, we submit, is not controlling here. In *Cincinnati v. Cincinnati Traction Company,* 245 U. S. 449 an injunction was approved in the case of an ordinance providing for judicial proceedings because other means of action were not prohibited, just as in the case at bar the record shows forcible action and the further threat of the same by the city officials (R. 97, 106, 125, 126, 127, 155 and 156) and in *South Covington Railway Company v. Newport,* 259 U. S. 97 the Des Moines case was explained on the same basis. The vital difference is that the municipal legislation here involved did not contemplate any judicial action against the bondholders or their trustee. All proceedings have been directed solely against the Ohio Electric Power Company in disregard of the interests of the mortgagee and as far as it is concerned, the only action contemplated is direct and complete destruction of its property rights.

For the same reasons just stated we submit that the action taken and contemplated by the City, pursuant to the ordinances in question comes within the inhibition of Section 1 of the 14th Amendment to the United States Constitution against the taking of property without due process of law. *Postal Telegraph Cable Company v. Newport, supra; United Sheet and Tin Plate Company v. Hess, supra.*

IV.

PETITIONER'S MORTGAGOR, OHIO ELECTRIC POWER COMPANY, IS THE HOLDER OF INDEFEASIBLE FRANCHISES TO USE THE STREETS AND PUBLIC PLACES OF NORWALK, IN PERPETUITY WHICH ITS PREDECESSORS, THE INCANDESCENT LIGHT & POWER COMPANY, AND THE NORTHERN ELECTRIC COMPANY, RESPECTIVELY, DERIVED DIRECTLY FROM THE STATE OF OHIO BY INCORPORATION UNDER THE STATUTES IN EFFECT BETWEEN 1887 and 1896.

The foregoing statement of petitioner's fundamental position on the merits is based squarely upon the proposition that, under the statutes in effect from 1887 to 1896 The Incandescent Light & Power Company, and The Northern Electric Company, by their incorporations respectively in 1891 and 1895, each derived a perpetual franchise directly from the State of Ohio to manufacture and distribute electric energy for light, heat and power purposes in Norwalk and to use the streets and public places thereof, subject only as a condition subsequent to the making of an agreement with the City as to the "mode of use" of the streets and public places, or, in the event of any disagreement or failure to agree, to direction by the Probate Court as to the mode of use.

Petitioner further contends that the condition subsequent, as to the making and maintenance at all times of an agreement as to mode of use, has been and is now com-

pletely satisfied, so that the perpetual rights acquired have never been abandoned or lost and are not subject to divestment, and that petitioner's mortgagor is the holder of said rights (subject to the lien of petitioner's mortgagor) by reason of the various conveyances from its predecessors in title.

We understand the respondent City does not dispute the proposition that rights to use the streets and public places might be perfected under the statutes in effect from 1887 to 1896, but undertakes to defeat petitioner's fundamental proposition by making the following claims:

1. That the ordinance of October 7, 1890, whether considered as a franchise grant or as an agreement as to mode of use, was a valid contract binding upon the partnership, The Norwalk Incandescent Light Company, and its successors, which limited all rights in the city to a term of twenty years, so that the rights claimed expired in 1910.

2. That by the acceptance of the ordinance of October 7, 1890 the successors of the partnership, and therefore the petitioner, are estopped to claim present franchise rights in the city.

3. That the predecessor companies organized in 1891 and 1895, respectively, did not by virtue of their incorporations secure any vested rights to occupy the streets and public places; that there was nothing which could be construed as an agreement as to mode of use, unless it was the ordinance of October 7, 1890, which terminated all rights at the end of twenty years, so that the companies in question secured as part of their corporate franchises at most only the capacity or inchoate right to secure easements in the streets of the respondent City.

4. That the Act of April 21, 1896 (92 O. L. 204) revoked the capacities of the predecessor companies organized

in 1891 and 1895, respectively, to secure vested franchise rights in the city other than by grant from the city.

5. That the capacities of the predecessor companies organized in 1891 and 1895 to acquire franchise rights in the City were not assignable and so could not pass to their successors or to petitioner's mortgagor.

6. That the street lighting contract of April 13, 1905 terminated all rights of the predecessors of Ohio Electric Power Company upon the expiration of that contract August 31, 1915.

7. That the ordinance of July 1, 1924 was not an agreement with respect to the mode of use of the city streets.

All of these claims of the respondent City will be considered and disposed of in the course of our argument in support of the above stated fundamental proposition. It follows from what has been said that two questions, one principally of fact, and the other of law, are involved. The question of fact is whether or not an agreement as to the mode of use was made between the respondent City and the utility companies organized in 1891 and 1895, and if so, has there at all times been such an agreement between the various companies in the chain of title and the respondent City. The basic question of law is whether or not the companies organized in 1891 and 1895 secured state granted franchise rights in the respondent City which are immune to impairment by the City, with the further question as to whether or not anything has transpired to defeat or limit such franchise rights either by act or contract of any of the companies in the chain of title. Since the law questions involve the general nature of the rights arising under the statutes in effect between 1887 and 1896, they will be considered first. During the consideration of these questions it will be assumed that the 1890 ordinance constituted an

agreement as to mode of use, and that since its termination in 1910 there has at all times existed an agreement as to mode of use. The district court so held. (Memorandum Opinion, R. 232) The correctness of that holding will be demonstrated infra, pp. 71 to 83.

1. The Incandescent Light & Power Company and The Northern Electric Company Acquired Franchise Rights in Perpetuity From the State—the Ordinance of 1890 Did Not Limit These Rights.

The Act of January 26, 1887 (84 O. L. 7) made the provisions of Chapter 4 (Magnetic Telegraph Companies) of Title 2 (Corporations) of the Revised Statutes of Ohio applicable to electric light companies. We therefore set forth at this point the pertinent provisions of that chapter, and the Act of May 12, 1886, 83 O. L. 143.

Revised Statutes of Ohio 1880, Section 3454:

> "§ 3454. A magnetic telegraph company heretofore or hereafter created may construct telegraph lines, from point to point, along and upon any public road, by the erection of the necessary fixtures, including posts, piers, and abutments necessary for the wires; but the same shall not incommode the public in the use of such road. (50 v. 274, § 47.)"

Section 3454 granted to magnetic telegraph companies a state franchise upon any public road. The respondent City has suggested that the use of the term "road" indicates that this section was not meant to apply to streets of a municipality, but in view of the succeeding sections of the statute, and particularly Section 3461 and the cases construing them with reference to rights in municipalities, it is evident that the source of the grant whether involving locations within or without a municipal corporation is found in Section 3454.

Revised Statutes of Ohio 1880, Section 3461:

"§ 3461. When any lands authorized to be appropriated to the use of a company are subject to the easement of a street, alley, public way, or other public use, within the limits of any city or village, the mode of use shall be such as shall be agreed upon between the municipal authorities of the city or village and the company; and if they can not agree, or the municipal authorities unreasonably delay to enter into any agreement, the probate court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley, or public way, so as not to incommode the public in the use of the same; but nothing in this section shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness. (62 v. 72, § 5.)"

Revised Statutes of Ohio 1880, section 3471:

"§ 3471. The provisions of this chapter shall apply also to any company organized to construct any line or lines of telephone; and every such company shall have the same powers, and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies."

While the foregoing sections of the Revised Statutes were in effect the first statute relating to electric light companies was enacted May 12, 1886, which was incorporated into Revised Statutes of Ohio 1890, Section 8752 (83 O. L. 143). This act as far as pertinent was as follows:

"(8752) § 1. Be it enacted by the General Assembly of the State of Ohio, that a company organized for the purpose of supplying electricity for power

> purposes, and for lighting the streets and public and private buildings of a city, * * * and such companies may construct lines for conducting electricity for power and light purposes through the streets, alleys, lanes, lands, squares and public places of such city, village or town, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires, *with the consent of the municipal authorities of the city*, village or town, and under such reasonable regulations as they may prescribe. * * *" (Italics ours)

While by the Act of 1886 the legislature expressly made the rights of an electric light and power company in a municipality dependent upon the consent of the municipal authorities, very shortly afterward the Act of January 26, 1887 was passed, by which the legislature reversed its policy with respect to electric light and power companies, and made the provision of the chapter on magnetic telegraph companies applicable to any company organized for the purpose of supplying light and power.

The Act of 1887 which was incorporated in the Revised Statutes of 1890, Section 3471a. is as follows:

> "Sec. 3471a. The provisions of this chapter, so far as the same may be applicable, shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares, and public places with electric light and power, and every such company shall have the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies. (January 26, 1887, 84 v. 7.)"

The Act of 1887 continued in force until the Act of April 21, 1896 (92 O. L. 204) which amended Revised Statutes Section 3471a as follows:

"Sec. 3471a. The provisions of this chapter, so far as the same may be applicable except section three thousand four hundred and sixty-one, shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares and public places with electric light and power, or automatic package carrier; and every such company shall have the same powers, except those given by said section three thousand four hundred and sixty-one, and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies. *Provided, however, that in order to subject the same to municipal control alone,* no person or company shall place, string, construct, or maintain any line, wire fixtures or appliance of any kind for conducting electricity for lighting, heating or power purposes through any street, alley, lane, square, place or land of any city, village or town, without the consent of such municipality; and this inhibition shall extend to all levels above and below the surface of any such public ways, grounds or places, as well as along the surface thereof; but this inhibition shall not be applicable to any rights which have heretofore been received and exercised through proceedings of any probate court. * * *" (Italics ours.)

Thus under the Act of 1896 the legislature restored to municipalities control over future franchise rights of electric light and power companies within their boundaries, which control had been wanting in the period from 1887 to 1896. The line of demarcation drawn by the foregoing statutes clearly indicates that electric light companies incorporated thereunder during the years from 1887 to 1896 derived their rights to use the city streets direct from the state independent of municipal limitations. It is also quite

obvious that decisions of this court and of the Supreme Court of Ohio, with respect to the source and nature of rights derived by the incorporation of telegraph and telephone companies, under these statutes at any period during which they were in force, are of binding and conclusive effect in determining the source and nature of the rights acquired by the predecessor electric light and power corporations by virtue of their incorporation in 1891 and 1895, respectively.

What the powers and functions of the state and municipality were under the above statutes was first determined by the Supreme Court of Ohio in the leading case of *Zanesville v. Zanesville Telegraph and Telephone Company*, 64 O. S. 67, 59 N. E. 781 (1901) upon rehearing of the same case. The court's original and contrary conclusion is reported in 63 O. S. 442. This case involved the constitutionality of the provisions of Section 3461 in so far as jurisdiction was conferred upon the Probate Court, in that it was claimed to vest legislative power in the court. The telephone company's negotiations with the City Council for a mode of use agreement resulted in disagreement, and the company made application to the Probate Court to direct the mode of use. Thereupon that court held Section 3461 to be unconstitutional and dismissed the proceedings, which judgment was affirmed by the Court of Common Pleas but reversed by the Circuit Court. In coming to the final conclusion on rehearing that the statute was constitutional, the Ohio Supreme Court deemed it necessary to consider the general purpose and effect of the statutory provisions, and announced among others the following propositions of law in the syllabus and the opinion, which under the rule of *Palmer v. Zeigler*, 76 O. S. 210, 227, and *Republic Creosoting Company v. Boldt Construction Company* (C. C. A. 6) 38 F. 2d Series, 739, 740 are entitled to precedential weight.

1. "* * * It is competent for the State, through its legislative department, to grant to telephone and telegraph companies organized under its authority, the right to construct their lines in the streets of municipalities, * * *" (pp. 88, 89)

2. That corporations created under the above statutes "*when created* obtain from the state, franchises to construct and maintain their lines, from point to point, upon and along any public road or highway, * * * subject only to the limitation that the lines shall not be so constructed as to incommode the public in the use of the roads, and highways * * *" (p. 77). (Italics ours)

In other words, the right to *use* the streets is granted by the state—not by the municipality.

3. The only function of the municipality is to agree with the corporation as to the mode of use of the streets so that the public will not be incommoded in the use thereof. The court said, pages 80, 81:

> "* * * It will be noticed that it is not the right to use the streets that is made the subject of agreement between the company and the municipal authorities, or of determination by the court. *That right, as has been seen, is granted to the company directly by the legislature, and it is not made to depend upon any consent or agreement on the part of the municipality.* It is only the *mode* of such use that becomes the subject of agreement or judicial determination." (Italics ours).

and at page 83:

> "* * * The council is given no power to direct in what mode the lines of a telephone company shall be constructed in the streets of the municipality. Its sole province is to come to an agreement with the company in regard to the mode of using the streets by the company."

4. The purpose of providing for an agreement by the municipality is only that the public shall not be incommoded, which appears from the quotation already given.

5. It follows indubitably from the language of the court that a municipality may not defeat or impair a franchise grant by the state by insisting upon unreasonable or arbitrary terms as to mode of use, or by limitation in point of time. The court said:

> "* * * The statute contemplates that if the mode of using the public ways of cities and villages by telephone companies were left entirely to agreement between the council and company, the franchise of the latter might be made unavailable by the refusal of the former to negotiate with the latter, or by *bona fide* disagreement of the parties, a contingency not unlikely to occur; and hence, the necessity for the provision of section 3461, now in question, by which jurisdiction is conferred on a competent court to determine the mode of such use by an order binding on both parties. (p. 82).
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> "* * * The inability or failure of the council to come to an agreement with the company in regard to the mode of using the streets for that purpose, practically amounts to a denial of the company's right, the remedy for the enforcement of which is that provided by section 3461 of the Revised Statutes." (p. 89).

Farmer v. Columbiana County Telephone Company, 72 O. S. 526 (1905) presented this situation:

The City Council passed an ordinance presented voluntarily by one Thayer purporting to confer on Thayer and his assigns the *right* to construct a telephone system. The ordinance contained certain provisions for rates in the city and free connections with telephones outside the city, also to permit the use of poles for the city's fire alarm

boxes. The defendant company was incorporated under State law, and took an assignment of this ordinance and built the system. In this action, an individual and the City attempted to enforce by mandatory injunction the provision as to rates and free service. There was a cross-petition also by the city against the company setting up the claim of estoppel. The court very clearly held that the Council had no power to make the state granted rights contingent upon an effective arrangement as to rates and again declared that the right to use the streets comes from the State and that the power of cities is limited to agreement as to the mode of use. Part of the opinion is as follows:

> "* * * *A telephone company gets its right to go upon the streets, with its poles, wires, etc. from the state (sections 3454 to 3471-8 inclusive), and the power of the municipal authorities in the premises is to agree upon, not the right to use, but the mode of use,* and if no agreement as to mode shall be made within a reasonable time, the company may apply to the probate court, which court shall direct in what mode the line shall be constructed so as not to incommode the public in the use of the streets, etc. *In other words, municipal authorities may do what the probate court may do when a proper case is presented, and no other or different thing* * * * It follows that the council had no power to make an effective arrangement as to rates, and that the principal question will have to be determined against the plaintiffs in error." (pp. 531, 532). (Italics ours).

It should be noted that in the *Farmer* case the municipality passed an ordinance which was in form a franchise to an individual and his assigns, that it was assigned to a corporation and that the corporation nevertheless was held entitled to stand on the state granted franchise. In

the case at bar the same situation exists except that the 1890 ordinance ran to a partnership instead of an individual.

In *Queen City Telephone Company v. Cincinnati,* 73 O. S. 64 (1905), the court in holding that proof of complete corporate organization was a condition precedent to an action in Probate Court to fix the mode of use, discussed the nature of the right conferred by Section 3461 and approved the foregoing cases:

> "It is of course conceded as now well settled that the general power to occupy the streets of a municipality by a telephone company is derived from the state, as held in Zanesville v. Tel. Co. supra, and Farmer v. Tel. Co., 72 Ohio St. 526." (p. 81).

Macklin v. Home Telephone Company, 1 O. C. C. (N. S.) 373, affirmed without opinion, 70 O. S. 507, (1904). The defendant company in this case was organized under the telephone and telegraph statutes mentioned above, and then procured from the city an ordinance granting it the *right* to construct its system and fixing rates. Later, the Company increased these rates. The court held that the agreement as to rates was beyond the power of the City, pointing out that its control extended only to the agreement for mode of use. The court said:

> "• • • *The right of use of the streets and public ways by the telephone company is wholly beside and independent of the municipality, and, of course, is to be enjoyed like any other right, without let or hindrance from the municipality, except in the proper exercise of its police power* • • • Power to discharge the duty imposed by Section 2640, Rev. Stat., in connection with the construction of a telegraph or telephone plant is given by Section 3461, Rev. Stat., and is expressly limited to an agreement fixing the mode of use of the streets and public ways; • • •" (pp. 378, 379). (Italics ours).

In *Hardin-Wyandot Lighting Co. v. Upper Sandusky*, 93 O. S. 428 (1916), the Ohio Supreme Court for the first time considered the applicability of these sections to electric light companies organized between 1887 and 1896, and held that such companies derived franchises from the state.

The predecessor of the defendant company in that case was incorporated in 1889, and in the same year, the Village Council passed an ordinance purporting to grant a franchise in the village streets for electric light and power purposes without limit in time. This ordinance also contemplated a street lighting contract and such a contract was made. That contract having expired, and the parties being in disagreement as to the terms of a renewal, defendant remand all street lighting equipment but continued to serve private customers. After the passage of the Act of 1896 (restoring control to municipalities) and without procuring the consent of the Village under that act, the company undertook to re-establish the public lighting portion of its system. The Village thereupon brought an action in injunction to require the entire removal of defendant from the Village. This relief was denied by the Common Pleas Court.

In the Court of Appeals defendant filed a cross-petition, stating that the Village had passed an ordinance for the purpose of repealing the ordinance of 1889 and prayed that defendant's property be protected. The Court of Appeals decided that a decree of ouster could not be rendered in the action, but did enjoin defendant. The substance of this injunction is paraphrased on page 435 of 93 O. S. Its exact scope is not clear, but apparently the Company was enjoined from erecting any additional equipment without the consent of the Village. Defendant, *basing its claims upon its state granted franchise*, appealed to the Supreme Court, which court affirmed the Court of Appeals,

not on the ground that the Village had the power to issue franchises prior to 1896, but upon the sole ground that the company had forfeited its right to use the streets for street lighting equipment by the removal thereof, and that this abandoned right could not be restored without the consent of the municipality after the Act of 1896.

The opinion throughout shows the rigid adherence of the State Supreme Court to the proposition that due to the act of 1887, from 1887 to 1896 franchises such as those obtained by the predecessors of the Ohio Electric Power Company to use the streets were derived from the state and not the municipality. We quote from the opinion:

> "*The plaintiff in error rests its case here on the broad proposition that the right to distribute electricity over the streets of the village emanates from the state and not from the municipality.* It is contended that the plaintiff-in-error and its predecessor were organized under the laws of Ohio, with all the powers and privileges granted to telegraph and telephone companies by Section 9170 et seq., General Code, and that therefore no village ordinance was necessary to make its rights effective, except such as related to the mode of use. (p. 436).
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> "It is contended by the plaintiff-in-error that Sections 9192 and 9193, General Code, confer upon electric light and power companies all of the powers conferred upon telegraph and telephone companies in the sections above referred to. (p. 438).
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> * * * * * * * *
>
> "* * * This act did not repeal the act of May 12, 1886, supra, in express terms, but when the two acts are construed together it is clear that it was the intention of the legislature to confer upon electric light companies 'the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies.' *This was the state*

chise (March 4, 1889) which is involved in this case. of the law, at the time of the granting of the fran- Therefore, under the holdings in the cases cited, the grantee company derived its general power to occupy the streets from the state." (p. 439).

It is entirely clear from this language that the claim of a state granted franchise involved in the case at bar is the same as that asserted and sustained in the *Hardin-Wyandot* case.

It is significant to note that in 1917 Mr. Craig (then representing a predecessor of Ohio Electric Power Co.), now of counsel for the respondent City, in his letter to Mr. Ginn (Plaintiff's Exhibit 77, R. 480, 483) expressed the same view of the *Hardin-Wyandot* case, which is herein set forth.

Except as to the issue of abandonment there involved the *Hardin-Wyandot* case is highly analogous upon its facts to the case at bar. In that case the predecessor corporation received from the municipality what purported to be an ordinance grant without limitation in point of time. In the present case the predecessor corporations received assignments of an ordinance purporting to be a grant limited to 20 years, originally granted to the partnership formed in 1890 but running to its successors and assigns. While the statement of facts at page 429 of 93 O. S. speaks of a municipal franchise granted in 1889, it is plain from the language of the opinion quoted above that the company based its rights solely upon the state grant arising by reason of the incorporation of its predecessor, and that the court gave effect thereto.

The decision in the *Hardin-Wyandot* case did not give effect to the ordinance of 1889 as a franchise. It was the failure to comply with the Act of 1896 after prior abandonment of the street lighting rights which formed the basis

of decision restraining the Company from reinstating its street lighting equipment as appears from the opinion.

> "In this posture of the case, while *in view of the statutory provisions which were in force at the inception of the enterprise the village would not be entitled to annul the company's rights,* still, by reason of the facts stated above and the voluntary abandonment by the company of its rights and privileges to the extent set forth, it cannot now return and repossess itself of such rights as it abandoned without the consent of the village in accordance with existing law." (pp. 442, 443). (Italics ours).

It is, of course, clear that the "existing law" to which the court referred was the Act of 1896.

The above quoted language necessarily recognized and established the Company's right to continue the operation of its private lighting system without municipal interference, based squarely upon the statutes, and not upon the ordinance, as the City of Norwalk argues.

The case was affirmed by this court in 251 U. S. 173. (Decided December 15, 1919). That the interpretation employed in the decision of this Court was the same as that of the State Supreme Court, and that it expressly recognized the right of the company to maintain its private lighting system without further consent from or interference by the municipality appears from the following statements in the opinion at page 177:

> "* * * There was nothing in the decree affecting the maintenance or renewal of such poles and wires as were in use for private lighting, when the case was commenced, and that this omission was of deliberate purpose appears from the fact that *both courts held that the state statutes in force at the time the grant became effective, and the form of the proceeding, were such, that a decree annulling such rights as the*

company had then retained in the streets could not properly be entered in the cause.

* * * * * * * *

"From this state of the record we conclude that the state Supreme Court did not intend to deal with the right of the company to maintain, repair or replace such poles and wires as it was using for commercial lighting when the case was commenced, but that its injunction was intended to prohibit restoring of the street lighting poles and wires which had been taken down and all new additional construction 'until the consent of said village shall have been obtained,' and so restrained its judgment will be affirmed, * * *" (Italics ours).

The foregoing disposes of any claim by the respondent city that the *Hardin-Wyandot* case supports respondent's contentions. We think it is plain that the decision of this Court in the *Hardin-Wyandot* case would have been otherwise had the State Court decree attempted to deal with the company's commercial lighting equipment in the streets.

It is also true that these rights, being unlimited as to time, were granted in perpetuity. *Hardin-Wyandot Lighting Company v. Upper Sandusky, supra; Northern Ohio Traction Company v. Ohio,* 245 U. S. 574; *Ohio Public Service Company v. Ohio* Ex Rel. Fritz, 274 U. S. 12.

It necessarily follows that the twenty-year provision of the ordinance of October 7, 1890 did not and could not limit the right to use the streets of Norwalk. The City had nothing to give or withhold as to term and was without power to shorten the period of the State granted right.

The respondent City took the position in the court below that mere incorporation under the statutes in effect from 1887 to 1896 conferred nothing more than an inchoate right of eminent domain, or put in another way—the right to acquire franchise rights, or reduced to lowest terms, that

the companies got only the right to be that kind of a corporation. The cases already considered are sufficient to exhibit the utter fallacy of any such argument, which springs from a confusion between rights and their exercise. That the franchise rights might be lost by waiver or non-user may be conceded, but that the rights in issue in this case have always been used under appropriate agreement as to mode of use will be amply demonstrated infra.

Respondent's actual contention is that under the ordinance of October 7, 1890 the rights in the streets were limited to twenty years. Reliance for this claim is based upon a line of cases construing statutes patently dissimilar to the statutes here under consideration. The statutes in the cases relied upon by the respondent City below all provided that the utility could enter upon the street *only with the consent* of the particular municipality, or were cases where the city *had the absolute right* to fix terms and conditions for the use of its streets.

The obvious points of distinction is that in such cases the particular city could absolutely prevent the utility from entering upon its streets unless the utility agreed to do so upon its terms, while under the Ohio statutes here involved, the city could not prevent the exercise of the right, nor could it limit the same in point of time. The attempt may be made to reconcile such cases with the situation at bar upon the ground that the right to fix "terms and conditions" is the same as the right to "agree upon the mode of use." Obviously the right to fix "terms and conditions" is much broader than an option to agree upon "mode of use," the first being tantamount to the power to exclude, while the latter is not. Moreover, any such contention necessarily ignores the fact that the statute providing for agreement as to the mode of use conferred no absolute rights or powers upon municipalities, but in the event of

failure to agree provision was made for resort to the Probate Court *to direct the mode of use.*

We come now to the decisions in the quo warranto case against the Ohio Electric Power Company. The opinions of the Court of Appeals and Supreme Court appear in 35 O. App. 481, and 121 O. S. 235, respectively. Because of the implicit reliance of the respondent City upon those decisions, it is important to analyze them to see what the State Courts did decide and what they did not decide.

The State Courts did not decide that a state granted franchise acquired by incorporation under the laws existing from 1887 to 1896, followed by an appropriate agreement as to mode of use, could be or was limited in point of time by the twenty-year provision of the 1890 ordinance. *They simply concluded that the State granted right had never been made effective by any agreement as to modeof use.*

Neither did they decide that a corporation organized in the period above mentioned could not take franchises concurrently from the state and from the municipality, or that having done so they could not rely upon the larger grant, namely, the perpetual state franchise, unaffected by any time limitation in the municipal grant. The conclusion of the State Court that the state granted franchises never became effective by any agreement as to mode of use, no doubt resulted from the vital difference in facts between the presentation of the defense by the Power Company to the quo warranto suit and the case of the plaintiff in the suit at bar.

The present case was presented upon a widely different theory and a far different line of evidence from that employed by the company in its defense to the quo warranto action. The briefs in the State Supreme Court in the quo warranto suit show that *the company presented its case upon the assumption that no agreement as to mode of use*

had ever been made. We quote from its brief at page 22:

> "There is no evidence in this case of any agreement or any disagreement on the mode of use. The outstanding feature is that the Company occupied the streets and did business without any regulations by the municipality, and without any protest as to the mode of use of the streets."

The contentions made and evidence offered by the plaintiff herein are exactly contrary to the company's position in the State Courts. We shall hereinafter show that the evidence submitted by the plaintiff in the present proceeding was amply sufficient to sustain the Federal District Court in deciding in favor of the plaintiff on the ground that there *was* an agreement as to mode of use. The record here is so different from that in the State Courts as to make their decisions inapplicable here. On the record and contentions here made we would confidently expect a decision from the State Courts in harmony with that of the District Court.

The fact that the ordinance of 1890 could have validity but for one purpose, namely, to constitute upon acceptance an agreement as to mode of use, was never suggested to the State Courts. The detailed regulatory ordinance of July 1, 1924 and the uniform compliance (*infra* pp. 89 to 92) therewith by the company, are facts which were not even in evidence in the quo warranto suit. Also in that action the company's rights were based only upon the incorporation of the Northern Electric Company in 1895, the earlier incorporation of The Incandescent Light & Power Company in 1891 being disregarded. No attention was paid to the fact, that the council of Norwalk was informed that the partnership intended to incorporate, and that the council then made the ordinance run to the partnership's successors and assigns.

We therefore submit that the quo warranto decisions by the State Courts furnish no support for respondent's position. If, contrary to our analysis, the quo warranto decisions are to be deemed a reversal of the previously settled law of Ohio that corporations, such as the company's predecessors, acquired franchise rights from the State, then, as already pointed out, the District Court was correct in following the earlier decisions under the rule of Gelpcke v. City of Dubuque and many other decisions of this court, supra.

Summarizing and applying the law to the case at bar: the franchises in question were acquired between 1887 and 1896 at which time no Ohio case had contained a suggestion that such a franchise without time limit was revocable at will. This was clearly pointed out in *Northern Ohio Traction Company v. Ohio*, 245 U. S. 574, 584, and was reaffirmed in *Ohio Public Service Co. v. Ohio, ex rel. Fritz*, 274 U. S. 12. Furthermore, at the time petitioner's predecessor, The Equitable Trust Company of New York, acquired its rights under the mortgage in May, 1925 it had been definitely established in Ohio that such franchises were derived from the State. *Zanesville vs. Zanesville Telegraph & Telephone Company*, 64 O. S. 67 (1901); *Farmer v. The Columbiana Telephone Company*, 72 O. S. 526 (1905) *Queen City Telephone Co. v. Cincinnati*, 73 O. S. 64 (1905); and *Hardin-Wyandot Lighting Co. v. Upper Sandusky*, 93 O. S. 428 (1916), 251 U. S. 173. That the franchises were perpetual had been settled for Ohio by the decision of this court in *Northern Ohio Traction Company vs. Ohio*, 245 U. S. 574 (1918).

2. The Franchise Rights Acquired Are Incontestable—The Provisions of the Statutes Have Been Satisfied—An Agreement as to the Mode of Use Between the City and the Predecessors of the Ohio Electric Power Company Was Made in 1890 and Has Always Been Expressly Or Impliedly Kept In Force, Although Since Modified By The Ordinance of 1924.

Section 3461 Revised Statutes of 1890 provided:

> "The mode of use shall be such as shall be agreed upon between the municipal authorities * * * and the company * * *".

but did not prescribe any specific way in which such agreement should be reached or evidenced. *An agreement however reached and however evidenced satisfies the statutes.* It is plain upon the record in this case that this requirement of the statute has been met and fully performed: first, by the passage and acceptance of the Ordinance of October 7, 1890; second, even if that ordinance did not constitute such an agreement, an agreement must be implied from the acts of the parties during the entire period up to the present time; third, the defendant is estopped from denying the existence of an agreement as to mode of use; fourth, by the ordinance of July 1, 1924, and the company's compliance therewith.

(a) The Ordinance of October 7, 1890, was a Tender by the City Which by Acceptance Became an Agreement as to Mode of Use.

This ordinance, which has been set forth in full at pages 7 & 8, purports to grant what is called a franchise to a named partnership, its successors and assigns, for a period of twenty years, and then prescribes the mode and manner in which the electric lines shall be constructed and maintained upon the streets of Norwalk. We maintain that the ordinance was ineffective and void as a grant of a franchise; that it should be construed as a legal enactment, if

possible, and it can only be regarded as legal if treated as an agreement or tender of agreement for mode of use; and that the language of the ordinance, together with the surrounding circumstances, easily demonstrate that it was intended so to be.

(1) The Ordinance of October 7, 1890, was Ineffective as a Franchise Grant.

1. It is well settled in Ohio, as elsewhere, that municipal corporations (prior to Constitutional Amendment in 1912) had only the powers expressly conferred upon them by the legislature.

Billings vs. Railway Company, 92 O. S. 478, p. 482;

> "Under the constitution, previous to the amendment in 1912, municipal corporations in their public capacity possessed such powers, and such only, as were expressly granted by statute and such as might be implied as essential to carry into effect those which were expressly granted. Ravenna v. Pennsylvania Co., 45 Ohio St., 118."

This rule applies especially to public utility franchises: *Raynolds v. Cleveland,* 14 O. C. D. 215.

See also *Ampt. v. Cincinnati,* 21 O. C. C. 300, and for cases from other jurisdictions exhibiting the general rule see: *Worcester vs. Worcester Ry.,* 196 U .S. 539; *Chelsea vs. Treasurer,* 237 Mass. 122, 130 N. E. 397; *McAneny vs. Board of Estimate,* 232 N. Y. 377, 134 N. E. 187; *Elliott vs. Mongahela City,* 229 Pa. 618, 79 Atl. 144; *McQuillan Municipal Corporations,* 2d Ed. Section 1749.

An examination of the statutes in force in 1890 fails to reveal any general provision conferring power upon a municipality to grant an electric light franchise to either corporations or individuals. The only enactments having any relation to the subject are the Act of May 12, 1886, and Section 3471a, R. S. 1890 (Act of January 28, 1887). Sec-

tion 3471a was a part of the corporation chapter and obviously had no relation to partnerships. The Act of May 12, 1886 did, so long as it was in existence, confer upon the municipalities the right to grant franchises to *organized companies*. This act was repealed by implication upon the passage of the Act of 1887. (Section 3471a, R. S. 1890). On this point it is said in *Hardin-Wyandot Lighting Co. v. Upper Sandusky*, 93 O. S., 428:

> "This act did not repeal the act of May 12, 1886, supra, in express terms, but when the two acts are construed together it is clear that it was the intention of the legislature to confer upon electric light companies 'the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies'." (p. 439).

The quoted language cannot be regarded as dictum. *Eisner vs. Macomber*, 252 U. S. 189, 205, and a review of the history of statutes covering franchises to utility companies further demonstrates the correctness of such conclusion. At all times the Ohio Legislature made franchises subject either to municipal consent or free from it. At no time from 1852 to 1896 did concurrent sources of franchise rights exist. The Act of 1887 set up a procedure in direct conflict with that of the Act of 1886 and their co-existence would have been entirely out of accord with all previous legislative policy.

2. Aside from constitutional or statutory law as to the rights of a municipality, it has been expressly decided that a municipality does not have any general or implied power to grant electric light and power franchises.

Brush Electric Light Co. vs. Jones Brothers Electric Co., 5 O. C. C. 340 (1891) (Affirmed by the Ohio Supreme Court, 21 W. L. Bull., 72 (1893). In deciding this case the court said:

"* * * The ordinance of the city council, granting to it the right to erect and maintain in the streets, avenues, alleys and public ground of the city, poles and appurtenances necessary for furnishing light by means of electricity, was passed March 3, 1882. At that time there was not, nor until May 12, 1886 (83 Ohio L. 143) was there any statute of the state, which expressly conferred upon the municipal authorities of a city the right to make such a grant—and we are of the opinion that in no one of the clauses of section 1692, Revised Statutes, which is the general statute pointing out and enumerating the powers granted to municipal corporations, or by the provisions of sections 2492 ,or 2640, to which our attention has been called by counsel for the plaintiffs is any such power conferred, *even by implication. The clear doctrine of the law is, that municipal corporations have such powers only as are expressly conferred by the legislature, 'and those which are necessarily or fairly implied in; or incident to the powers expressly granted, or those essential to the declared objects and purposes of the corporation not simply convenient, but indispensable'.*" (pp. 341, 342).

The Act of 1886 which conferred upon municipalities authority to grant franchises to electric light and power companies, having been repealed by the Act of 1887, no such authority was in existence until it was restored by the Act of 1896. The *Brush* case, involving an ordinance situation prior to 1886, is therefore most potent authority for the proposition that a city did not have authority concurrently with the state to grant franchises to electric light and power companies in 1890.

Respondent, of course, takes the position that the ordinance of 1890 was a valid enactment conferring a franchise upon the partnership, and that the power to grant the fran-

chise was derived from the city's general control of the streets.

Respondent placed its chief reliance in the courts below in the case of *Kinsman Street Railway Co. vs. Broadway R. R. Co.*, 36 O. S. 239 (1880), but the distinction clearly appears from the opinion in that case that the street railway involved therein was organized under the Ohio Corporation Act of 1852, and that under specific provisions thereof the railway company was bound to observe *the terms and provisions* imposed by the city. Hence it is evident that the *Kinsman* case furnishes no support for any claim by the respondent city that in 1890 it could grant electric light franchises by virtue of its general powers over its streets.

Respondent also relied below upon certain cases in the United States Supreme Court coming from Ohio and involving franchise ordinances. *Northern Ohio Traction Co. vs. Ohio*, 245 U. S. 574, involved a street railway franchise granted by county commissioners. Admittedly, the local authorities had the power to act under a directly applicable statute. In neither of the other cases, *Hardin-Wyandot Co. vs. Upper Sandusky*, 251 U. S. 173, and *Ohio Public Service Co. vs. State*, 274 U. S. 12, which were also relied upon by respondent, as we understand them, did this court consider the general power of a municipality apart from statutory authority.

An analysis of the *Ohio Public Service* case shows that it does not support the proposition urged for it by respondent, namely, that a municipal ordinance like that of October 7, 1890, constitutes a binding contract. It is quite apparent that the decision did not turn upon that question, but upon the issue as to whether the rights, whatever they were, were assignable in 1907, in view of the provisions of the Act of 1896. At page 333 of 113 O. S. the court said:

> "It is not of great moment to decide whether the respondent is correct in claiming that the ordinance of 1892 constituted a special franchise to use the streets of the village. In either case, whether the right in question was derived from the state or the village, it was not under the circumstances set forth in this record assignable."

The court then decided (pp. 336 and 337) that whether the rights were considered to be a state or municipal franchise, they were not assignable in 1907 without the consent of the state. The court, however, recognized that state granted rights were involved by saying at page 337:

> "* * *The rights acquired by the Orrville Light, Heat & Power Company from the state in 1893, under Sections 3454 and 3471a, Revised Statutes, could not be annulled or revoked by the village of Orrville, nor by the State of Ohio, after the passage of the amendment of 1896."

The applicability of the foregoing language to the case at bar is completely demonstrated when it is taken into account that the Orrville Company was organized in 1893 and then succeeded to the rights acquired by two individuals under an ordinance in the form of a grant by the Village in 1892, the facts thus being the same as in the instant case. The company claimed in that case exactly as petitioner does here, that the incorporation in 1893 constituted a grant from the State of Ohio, which taken with the ordinance of 1892 created and fixed rights which the Village had no power to disregard.

The State Supreme Court obviously thought it was proceeding in harmony with the *Hardin-Wyandot* case, supra, from what was said at page 338 of the opinion, but seemed to feel that the facts were different because the question of assignability was not raised in that case. When

this court came to review the *Ohio Public Service* case, (274 U. S. 12) it was concerned solely with the question of assignability of the rights as determined adversely to the company in 113 O. S. 325. It is not evident that its decision turned upon the question as to whether or not there was a state granted franchise, but that this court simply held consistently with *Northern Ohio Traction Co. vs. Ohio*, 245 U. S. 574, that the franchise rights, which the State Supreme Court had found existed, were not subject to termination at the mere will of the city, and that if the statute of 1896 were construed to sustain such a right to terminate the franchise, it was in conflict with the contract impairment clause of the federal constitution. The result in this Court would have been the same whether or not the franchise was from the state or the municipality, we submit, so it was wholly unnecessary for this court to go into the question of the source of the franchise. That the same distinction applies to the *Hardin-Wyandot* case, we have already pointed out (supra p. 64).

Furthermore, if the city had full power to grant a franchise by the ordinance of October 7, 1890, then there was no reason why either the act of 1886 or that of 1896 should have been passed by the state legislature.

Respondent of course relies upon the opinions of the state courts in the quo warranto case. We have already pointed out why those decisions are not controlling, (supra. pp. 68 to 70). Furthermore, both of the courts in that case found that a partnership could not obtain a state franchise in 1890 and concluded that the rights acquired were of municipal origin. Those courts entirely overlooked the question of whether municipal power existed, probably because the point was not very seriously presented.

(2) The Ordinance of October 7, 1890, Constituted an Agreement for Mode of Use.

This ordinance being ineffective for the purpose of granting a franchise, we maintain that it should be regarded as an agreement for mode of use, as was done by the trial court.

It is well established that where a city ordinance may be given two constructions, one of which will make it invalid and the other valid, the latter construction should be followed if at all reasonable, 43 C. J. 570; *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 546.

The city council was aware in advance that the partners intended to form a corporation; they knew that the ordinance ran to successors and assigns of the partnership; and they knew of the transfer of all its property to the corporation formed in 1891 (R. 61, 62). The language of the ordinance when read with the facts just stated, it seems to us, leaves no question that our view as to its nature is correct.

Assuming that the Village Council meant to act legally, the ordinance is entirely consistent with such view. It contains all of the necessary provisions as to the manner in which the wires and poles were to be constructed and maintained. The absence of greater detail as to the mode of use in those early days of the electric light and power business is not surprising, and it is nevertheless quite apparent that the ordinance laid down certain standards and required construction and maintenance of the company's equipment to be along definite lines. The mere fact that a limitation of twenty years was expressed does not necessarily mean that a franchise was being granted, but rather as a matter of reason that the council felt that it should not attempt to agree at that time as to the mode of use for a period greater than twenty years.

It has been demonstrated by the decisions discussed above in the cases of *Zanesville vs. Zanesville Telegraph and Telephone Co.*, 64 O. S. 67; *Farmer vs. Columbiana County Telephone Co.*, 72 O. S. 526, and *Queen City Telephone Company vs. Cincinnati*, 73 O. S. 64, that between 1887 and 1896 the sole function of municipalities was to agree upon mode of use, and that they could not thereby either prevent the securing of perpetual franchises or impair the perpetual character thereof by entering into invalid agreements with utilities companies as to rates, failure to agree, or by plain rejection of the overtures of such company looking to agreement. Plainly under Sec. 3461, Rev. Stat. 1890 and the cases cited above in this paragraph any provision requiring the surrender of a state granted franchise after 20 years as consideration for an agreement as to mode of use would have been invalid as an illegal attempt by the municipality to exact compensation for the use of the streets. Thus, assuming, as must be done, that the Norwalk Council meant to act legally, the only deduction possible is that in passing the 1890 ordinance the Council did so by way of exercising its only function, namely that of agreeing upon mode of use.

We find strong support for our view in the very words of present counsel for the respondent City. Several of the attorneys now representing the respondent represented its interests in the quo warranto suit against the Ohio Electric Power Company, and in the brief which they filed with the Supreme Court of Ohio in that case at page 28 thereof, with reference to the ordinance of October 7, 1890, they said:

> "* * * That ordinance prescribed the '*mode of use*' by the persons or company operating the electrical equipment. * * *"

That the agreement became complete by acceptance cannot well be denied, for both the District Court below (Memorandum Opinion, R. 212, 231) and the Supreme Court of Ohio so found. The latter court in its opinion affirming the decision of the Court of Appeals ousting the Ohio Electric Power Company from the streets of Norwalk expressly says with respect to the grant by the municipality to the partnership:

> "* * No written acceptance was provided for, nor shown in the record, but it does appear that the ordinance was enacted upon the application of the partnership, members of which attended the meeting of council and personally accepted the grant, and thereupon the grantees entered upon, and thereafter the company which took over the property of the partnership continued to operate, the plant and lines constituting the only lighting system then existing in the City of Norwalk." (121 O. S., 237).

Since the ordinance in terms dealt with the mode of use, since it has been expressly found that the grant was accepted, since it was to the partnership, *its successors and assigns*, and since its successors and assigns have conducted themselves in accordance therewith, (R. 70, 77, 78, 84, 94, 95, 128-130), and the term stated in the ordinance was twenty years, we do not see how it is now open to question, that there was an agreement under Section 3461 Revised Statutes 1890 as to the mode of use which continued at the very least for a period of twenty years from 1890.

There is nothing novel about this construction of the ordinance. In *Farmer vs. Telephone Co.*, 72 O. S. 526; *State, Ex Rel. Matthews vs. Central Union Telephone Co.*, 14, O. C. C. 273; and *Macklin vs. Home Telephone Co.*, 1 O. C. C. (N. S.) 373, all discussing such ordinances purporting by their language to grant a franchise right, the ordinances

were treated only as mode of use agreements, as was done also in the case of *Hardin-Wyandot Company vs. Upper Sandusky*, supra.

In like situations city ordinances were held void in so far as they attempted to grant franchise rights which the municipalities were powerless to convey, but valid in so far as they related to mode of use, and further, that they did not constitute a waiver of rights acquired under state legislation or any estoppel against the companies to claim the state granted rights. *Iowa Telephone Co. vs. Keokuk*, 226 Fed. 82, 99, 100, (D. C. Iowa); *Northwestern Telephone Exchange Co. v. Minneapolis*, 81 Minn. 140, 86 N. W. 69, 74.

The further question arises as to when, if ever, there came a disagreement between the City and the Ohio Electric Power Company, or any of its predecessors as to mode of use.

Although the Ordinance of 1890 expired by its terms in 1910, it must be said that its provisions as to mode of use continued in effect until some affirmative action was taken by either of the parties. It is clear from the record that after 1910 the various companies continued to operate and to observe the mode of use originally agreed upon and later modified by the ordinance of 1924 with the full knowledge and acquiescence of the city. It has often been held that after the expiration of a franchise grant the utility continues to have a lawful right to use the streets until the municipality takes affirmative action. The utility is not regarded as a trespasser.

Denver v. Denver Water Co., 246 U. S. 178;
Hill v. Elizabeth City, 298 Fed. 67, 69. (C. C. A. 4);
Doherty & Company vs. Toledo Railways & Light Company, 254 Fed. 597, 601 (N. D. Ohio, W. D.);
Cedar Rapids Water Co. vs. Cedar Rapids, 118 Iowa 234, 91 N. W .1081, 1090.

Certainly the same rule should apply where the city does not confer the right to use, but merely agrees as to the mode of use. Accordingly, the mode of use agreement provided for in the Ordinance of 1890 continued in force until the electric light ordinance of July 1, 1924, which contained new regulations as to manner of use which were enforced by the city and complied with by the company. That ordinance with its detailed provision as to the mode of use of its streets and the careful compliance by the Ohio Electric Power Company therewith ever since demonstrates, we think, conclusively that there never was a disagreement as to mode of use.

(b) Regardless of the Ordinance of 1890 an Agreement as to Mode of Use Has Always Existed.

Even if it be held that the Ordinance of October 7, 1890 cannot be regarded as an agreement for mode of use within Section 3461, nevertheless we respectfully submit that the parties were at all times in agreement as to the mode of use. Section 3461, Rev. Stat. 1890, did not specify the kind of agreement (as is pointed out by the Ohio Supreme Court, quo warranto case, 121 O. S. 235) and in the absence of a requirement that this agreement be in the form of an express written instrument, an agreement by implication should be sufficient. Such is the general rule applicable to similar situations. Dillon on Municipal Corporations, Page 1947:

> "• • • No particular mode of manifesting the municipal consent to the construction of a railroad or other public utility in the city streets is prescribed by the usual constitutional provision and in such case it has been said that so far as the Constitution is concerned, such consent may be either express or implied. And it has also been held that the consent of the municipality required by statute *may be presumed* where the streets of the municipality

> have been used for a long period of years by the company under such circumstances as to amount to a claim of the right to use them."

If such a rule applies to a case where consent is required, it would certainly apply where the power of the municipal authorities relates only to the mode of use, and such is the law of Ohio *State Ex Rel v. Central Union Telephone Co.*, 14 O. C. C. 273. This case has been discussed before and as we then pointed out, the court held that a telephone company could not be ousted from the streets until it was shown that the parties had failed to agree upon the mode of use.

An examination of the record in this case will show that from the time The Incandescent Light & Power Company occupied the streets of Norwalk in 1891, the city and the operating company were never in dispute as to the mode of use. All laws and ordinances as to the maintenance of the system were complied with and whenever any changes were contemplated the company secured the approval of the city authorities. (R. 70, 77, 78, 84, 94, 95, 128-130). Although various disputes arose from time to time, it does not appear at any place that these disputes related to the mode of use. The city at no time demanded an express agreement or a new agreement of any kind.

(c) The Defendant is Estopped From Denying the Existence of an Agreement as to Mode of Use.

While we do not believe that the City could limit its agreement as to the mode of use to 20 years, for the purpose of discussion of the question of estoppel we may assume that this agreement as to the mode of use expired under the 1890 ordinance in 1910.

That, then, presents the question as to whether or not the city can now assert that there has been no agreement

between it and the power company and its predecessors as to the mode of use of the streets since 1910.

Taking the case most favorably for the city, it is only an express agreement as to mode of use which has been lacking since 1910, although we think there has been an express agreement since that time. To date the city has given no notice whatsoever that it will require a new agreement, except the 1924 ordinance, with which the Company has complied. Instead, it has taken a position which must involve a claim that it may oust the company without even notifying it that a new agreement as to the mode of use is desired by the City. Such a position seems clearly wrong. *State ex rel vs. Central Union Telephone Co.*, 14 O. C. C. 273. Even construing the ouster ordinance of March 23, 1926 (Plaintiff's Ex. 42, R. 445), as including a demand for a new agreement, (which we submit, it clearly does not), the time given, that is thirty days, was unreasonably short, for thirty days would probably be an inadequate time in which to attempt an agreement and prepare an application to probate court, even failing to take into consideration the time which would be necessary to move the company's equipment.

That such a reasonable time must be given is held in *State, ex rel vs. Telephone Co.* 14 O. C. C. 273, where it appears that the telephone company had a permit to use the streets for ten years. After the expiration of this period negotiations were carried on for two years without any agreement being reached, th city attempting meanwhile to regulate the rates. The city then filed a petition for ouster. It was held that the city had no right to compel ouster until it was shown that no agreement could be reached, and that the company had delayed an unreasonable length of time in applying to probate court. Because of the failure to make such a showing the action was dismissed.

The foregoing discussion has been based upon the assumption that the ordinance of 1890 amounted to an agreement as to mode of use. The situation may even be considered upon the basis that this ordinance was of no effect whatsoever, with the result that the company and its predecessors have been operating in the City of Norwalk for some forty-two years, or thirty-six years to the beginning of the ouster procedings, without any express agreement with the City as to mode of use, but that during all of this time these companies have operated in the City, they have installed their poles on public streets with the full knowledge of the city authorities. (R. pp. 70, 77, 78, 84, 94, 95, 128-130), have expended large sums in the installation, extension and improvement of this system (R. pp. 78, 94), have permitted the joint use of their poles by the city (an ordinance authorizing such joint use having been passed after the date when the city claims their rights ended, Plaintiff's Exhibit 37, R. 436), and that they have paid taxes upon this system of which the municipality has received its share annually over the period 1911-1929. (Stipulation, Plaintiff's Exhibit 1, R. 279, 280). And it further appears that at various times down to 1915 the City contracted with them for the furnishing of electric light and power. (Defendant's Exhibits G & H, R. 87, 534, 541).

Obviously up to the time that the Norwalk properties were acquired by the Ohio Electric Power Company and the bonds were issued and sold based upon the security of those properties, the City of Norwalk had never asserted that an agreement as to mode of use did not exist. Upon the faith of the fact that the operation of the predecessor companies over the entire period in question had been notorious and under a claim of right, and that no objection thereto had

ever been asserted by the City, the Ohio Electric Power Company acquired the properties and the bondholders represented by the Trustee petitioner expended their money.

On these facts it is submitted that the City is estopped to say that during all these years the companies were operating contrary to its will.

That an estoppel may operate against a municipal corporation is held in *Boone County vs. Burlington & Mo. River R. R. Co.*, 139 U. S. 684, and in *Louisville vs. Cumberland Telephone & Telegraph Company*, 224 U. S. 649, this was applied to a franchise case. In this case the city repealed a franchise ordinance after the company had spent largo sums in installation and improvement of its system. One of the grounds urged by the city was that the original franchise ordinance was not a valid one. This court said.

> "With the knowledge and acquiescence of the city, and in reliance on the statutory conveyance of the street rights, the Cumberland Company, at an expense of more than a million dollars, erected many new poles, laid additional conduits and strung miles of wire in extending and improving the telephone system. This action of the council could not enlarge the charter grant, but did operate to estop the city (Boone County v. Burlington & M. R. R., 139 U. S. 684, 693) from claiming that the ordinance was inoperative and it also prevented the Council from denying that the Cumberland Company had succeeded to every right and obligation of the Ohio Valley Company." (p. 662).

Among a multitude of authorities clearly establishing an estoppel against the City of Norwalk upon the facts of this case are:

Atlanta vs. Gate City Gas Light Co., 71 Ga. 106;
Bradford vs. New York & P. Telephone & Telegraph Co., 206 Pa. 582, 56 Atl., 41;
Spokane St. Ry. Co. vs. City of Spokane Falls, 6 Wash. 521, 33 Pac. 1072;
Dillon on Municipal Corporations, Page 1947;
Town of Newcastle vs. Lake Erie & W. R. Co., 155 Ind. 18, 57 N. E. 516.

In the case of *Atlanta vs. Gate City Gas Light Co.*, supra, the corporation was created by the state, and the court held that it had a right to install mains without the consent of the city. Furthermore, it was pointed out that an estoppel arose against the city in the following pertinent language:

> "But apart from all these considerations, the city of Atlanta has stood by and seen this company make an outlay of $140,000 in the exercise of their rights under this charter, without intimating to them that objection would be made to their use of the streets for the purposes authorized, and without the use of which their enterprise would not have been undertaken and could not be prosecuted, and without which they would lose their entire outlay and be involved in irretrievable ruin. Upon every principle of equity this failure to notify the complainant of their intention until this heavy expenditure had been made, would estop them. Such conduct is fraudulent in the eye of the law, and where practiced upon an innocent party, who is seeking bonafide to carry out the provisions of its charter by availing itself of

the powers and privileges thereby granted, would, if anything could, debar them from now being heard * * *" (pp. 125-126).

And see:

State of Missouri, ex rel vs. Missouri Utilities Company, 53 S. W. (2d Series) 394 (Supreme Court of Mo.)

The record shows that during the years from 1910 to 1930 taxes were assessed by the proper authorities of Ohio upon the real and personal property of Ohio Electric Power Company and its predecessors in Norwalk, were paid by the company and its predecessors, and *the City of Norwalk received its share, based upon a certain tax rate per thousand in the City of Norwalk, Ohio, of all taxes collected upon said real and personal property located in the City, which tax money it received as a result of the continued use of its streets,* (with the City's knowledge) by the company's lines and poles (Stipulation, plaintiff's Exhibit 1, R. 279-280). That assessment and collection of taxes is a strong element of estoppel against the city has been recognized time and again.

Old Colony Trust Co. v. City of Omaha, 230 U. S., 100, 101.

Spokane St. Ry. Co. vs. Spokane Falls City, 6 Wash. 521, 33 Pac., 1072;

Commercial Electric Light & Power Co. vs. City of Tacoma, 17 Wash. 661, 50 Pac., 592, 593, 594;

Santa Rosa City R. Co. vs. Central St. Ry. Co., 4 Cal. Unrptd. 950, 38 Pac. 986;

Valley Rys. vs. City of Harrisburg, 280 Pa. 402, 124 Atl., 644, 647;

Chicago, Rock Island and Pacific R. R. Co. vs. City of Joliet, 79 Ill., 25, 39;

The Chicago & Northwestern Ry. Co. vs. People, ex rel., The City of Elgin, 91 Ill., 251, 254;

The foregoing authorities on the basis of the record in this case not only establish an estoppel against the respondent City, but that to the extent any consent or agreement is necessary it will be presumed from the acquiescence and silence of the city. That agreement must require only a reasonable use. It is conceivable that the method of use should be changed from time to time with new developments in city life.

However, no disagreement as to the mode of use having ever been expressed by the city, and no demand having been made by it for a new agreement since 1924, we submit that certainly the city is estopped to deny that it has to this date agreed to the existing mode of use. The statute under which the city was given the right to agree to the mode of use prescribed no definite way in which this was to be done. We therefore submit that the city could not have agreed to the mode of use in any more conclusive fashion than it has done, namely, by acquiescing and failing to make any objection to the mode of use, knowing all the time that the properties in question have been transferred from one company to another and have been maintained under a clear claim of right by the power company and its predecessors. No objection has appeared upon the part of the city except its attempt to oust the power company solely under the claim that the power company is without right in the city streets and public places, which is quite another thing from a failure to agree upon the mode of use.

(d) The Mode of Use Agreement Was Modified by the 1924 Ordinance and Recognized by Both the City and the Company and Has Continued in Effect.

As stated above, on July 1, 1924 the Norwalk City Council passed an ordinance regulating in detail the mode of use of its streets by electric light and power companies.

(Plaintiff's Exhibit 38, R. 438). The record shows that the City called upon the company repeatedly to comply with this ordinance and that the company did comply. (Plaintiff's Exhibits 51-61, 63, 66, R. 457-469; R. 128-130). This ordinance has not been changed and it remains in effect, as admitted in defendant's Answer (R. 48). Hence, there was from 1890 to 1924 an agreement as to mode of use which was express, at least until 1910, and from 1910 on there was at least an implied agreement as to mode of use, with a total absence of any objection by the City, and from 1924 on there were additional provisions as to mode of use which were recognized and agreed to, as demonstrated by the conduct of both the City and the Ohio Electric Power Company thereunder.

The position of the respondent city has been that this ordinance could not be construed to be the consent to use the streets of the city required by the Act of April 1, 1896. Certainly that flat assertion by respondent is not to be accepted in lieu of argument or authority. Contrary to the claim of the respondent City, we respectfully maintain that the effect of this ordinance was three-fold, viz.:

First, it amounted to a request by the city upon the company for a modification of the mode of useagreement which had theretofore been in effect since the passage of the Ordinance of October 7, 1890. The Company's acquiescence in the provisions of the 1924 Ordinance amounted to an acceptance of such modification of the mode of use agreement. The respondent City admits the ordinance still stands unchanged. It therefore stands admitted that there is no existing disagreement as to the mode of use of the streets.

Second, if it were necessary for the operating company, under the provisions of the Act of April 21, 1896, to

obtain the consent of the city to the continued use of the city's streets by the company (which we emphatically deny), this Ordinance of July 1, 1924, and the conduct of the city thereunder above mentioned, clearly would constitute such consent. *Cincinnati v. Diamond Light Co.*, 4 Ohio Appeals 177, relied upon below by the city, is not in point as the Ordinance there in substance provided that it was applicable only in the event municipal grants by other Ordinances should first be made. Nothing of that sort appears in the Norwalk Ordinance of July 1, 1924.

It is pertinent to observe with respect to the effect of the Ordinance of July 1, 1924, that Judge Hahn who heard this case said in the fourth foot note to his Memorandum Opinion "The ordinance is tantamount to a consent to the use of the streets by the City of Norwalk. The record in the case in the Supreme Court of Ohio shows that the ordinance was never called to the attention of that court." (R. 239). Judge Hahn was pointing out in the foot note in which the above quoted statement appears that it was not unlikely that the decision of the Supreme Court of Ohio in the quo warranto suit, 121 O. S. 235, would have been in favor of the utility upon the vitally different record in the case at bar.

Third, the Ordinance of July 1, 1924, and the conduct of the city thereunder constitutes the clearest kind of estoppel against the city and, we submit, forever foreclosed the city from the right to assert that the operating company was not using the city's streets with the consent of, and in the manner approved by, the City of Norwalk. It is, we submit, most unconscionable for the city to pass such an Ordinance, make it applicable to existing lines, serve notice upon the company many times requiring it to conform its lines to the Ordinance, and then claim, after the company has spent very substantial sums of money in so

doing and has loyally lived up to the city's requirements on its part, that the company after all has no rights on the city's streets and can be thrown off at will.

3. The Ordinance of October 7, 1890, and its Acceptance by the Predecessor Corporations Did Not Constitute Either a Waiver or Estoppel and Petitioner is not Precluded From Asserting That Its Mortgagor Has a Perpetual Right to Use the Streets and Public Places of the City of Norwalk.

Respondent asserted below that the acceptance of the ordinance of October 7, 1890, and the admission by petitioner, that whatever rights were conferred by this ordinance were transferred to various predecessors of petitioner's mortgagor, estops petitioner from now asserting that the present company and its predecessors occupied the streets by virtue of any rights acquired direct from the State of Ohio. This argument is, of course, based upon the theory that the ordinance of 1890 in and of itself granted a right to use the streets, a proposition which petitioner does not admit, but which will be assumed for the purpose of arguing this point.

Regarding the matter abstractly, it is difficult to understand why the acceptance of privileges to do a certain thing from separate and concurrent sources of authority should require the grantee of these privileges to rely upon one or the other of the grants, or further, why he should be forced to rely upon the lesser grant. That, in substance, is defendant's claim.

A consideration of the authorities demonstrates that no such rule exists in the law. It is uniformly held that under ordinary circumstances a utility may procure franchises from the municipality as well as the state, without sacrificing its state granted rights. This has been held both where the municipality acted with authority and without.

The ordinance of October 7, 1890, which the respondent City claims was a franchise limited to twenty years binding upon the predecessors of the Ohio Electric Power Company, shows upon its face that its acceptance could not foreclose them from taking a perpetual franchise from the state. We quote from the 1890 ordinance:

"This grant of way is not exclusive * * *" (R. 37).

Even if it be assumed that the city had the power to grant such franchises, that fact would be an immaterial consideration, because the state had the power (on this hypothesis concurrently with the city) under the statutes in effect from 1887 to 1896, and under the authorities the application for, or acceptance of, a municipally granted franchise could not be deemed a negation of the right to take franchises from the state.

In the following cases it is held that the owner of a state granted franchise did not prejudice this right by procuring an additional franchise relating to or embracing the same right from a municipal corporation, although the municipal corporation had authority to grant such a franchise.

The case of *City of Lansing vs. Michigan Power Company*, 183 Michigan, 400, 150 N. W., 250 (except as to the power of the city), was very much like the present situation. In that case the city filed its bill of complaint to compel the defendant to remove from the streets its poles and wires. The city claimed that the respondent's only right to be upon the streets arose out of a franchise granted by the city to respondent's predecessor and assignor, and that the franchise had expired by reason of its terms of limitation. The respondent claimed to be using the streets under a grant of the Legislature contained in Act 264 Public

Acts of 1905. There was no question but what the franchise granted by the city had expired by reason of its terms of limitation, and the city claimed it was not then open to the defendant in the absence of an express negation of use under the city's franchise to make a claim of right under the law of 1905. The opinion of the trial court (approved verbatim by the Michigan Supreme Court) with respect to this contention was as follows:

> "• • • This claim of the city implies that the franchise constituted the sole authority for the use of the streets by defendant, and that, while the franchise was in existence, no other authority could be accepted, though open to all persons and corporations not having a franchise from the city. This position is untenable, for the city had no authority to grant the use of the streets for the setting of poles and the stringing of wires, except as it derived authority by grant of power from the Legislature, and a grant of such authority by the Legislature in no way lessened the sovereign power of the Legislature to also grant the right to individuals and corporations within the city, and to do so regardless of any action by the city.
>
> *"The city of Lansing had authority from the Legislature to grant the franchise in question, but this grant of authority in no way prevented the Legislature from granting the right to all persons, and the franchise did not estop defendant from having the benefit of a general law of the state.*
>
> • • • • • •
>
> "The Act of 1905 granted to defendant, as well as to all others, the right to use the streets for the purposes of promoting and making possible public utility service, and, when defendant made use of such grant, it was not necessary for it to disclaim user under the franchise from the city, for the fran-

chise and the act of 1905 were not at all inconsistent in purpose and scope." (150 N. W. 251) (Italics ours)

The parallel between the Michigan case and our situation upon the point is complete. In that case there was a claim of a city franchise but expressly limited as to time, just as in the Norwalk case the claim was that the city granted a franchise in 1890 expressly limited to twenty years. In the Michigan case the city franchise was followed by the granting of a state franchise just as we contend state franchises were granted to The Incandescent Light & Power Company and the Northern Electric Company, predecessors of the Ohio Electric Power Company, under the Act of 1887, by the granting of their charters in 1891 and 1895, respectively. *It is further pertinent to our case that the Michigan court said that the company in accepting the state franchise was not bound to disclaim user of the rights given by the city.*

The undoubtedly correct holding in the Michigan case above cited demonstrates the position of the defendant city to be untenable. Even if it be conceded that the Ordinance of October 7, 1890, granted to the partnership a twenty year franchise, which was transferred to the predecessors of the Ohio Electric Power Company, it is plain that those predecessors could hold simultaneously such twenty-year franchise and perpetual franchises acquired from the State of Ohio by virtue of their incorporations in 1891 and 1895, respectively. The argument of the respondent city based upon the twenty-year limitation of the 1890 ordinance ignores the obvious fact that any such limitation could not operate adversely upon the perpetual franchises acquired from the State of Ohio. Hence the argument that all franchise rights terminated in 1910 is futile.

To the same effect see:

Town of Golconda vs. Field, 108 Ill., 419.
City of Wichita vs. Old Colony Trust Company, 132 Fed. 641 (C. C. A. 8).
Abott vs. City of Duluth, 104 Fed. 833 (D. C. Minn.) affirmed 117 Fed. 137 (C. C. A. 8).

It is equally true that a state granted franchise is not prejudiced in any way by the acceptance of an unauthorized municipal ordinance, which in term undertakes to grant a franchise. This precise question has been definitely decided against respondent in Ohio by the case of *Farmer vs. Telephone Company*, 72 O. S. 526, supra. The holding was the same in *Macklin vs. Home Telephone Co.*, 1 O. C. C. (N. S.) 373, affirmed 70 O. S. 507, where the ordinance recited that the company was "granted the right to use the streets." The court held the company's state granted rights unaffected.

And see also:

Atlantic & Pacific Railroad Company vs. City of St. Louis, 66 Mo, 228.
Northwestern Telephone Exchange Company vs. Minneapolis, 81 Minn. 140, 86 N. W. 69.
Iowa Telephone Co. vs. Keokuk, 226 Fed. 82.

It is our position that the Ordinance of October 7, 1890, if construed as granting a franchise, was unauthorized by existing law. (See ante pp. 72 to 77). However, this may be, the foregoing cases demonstrate that in any case its acceptance did not constitute a waiver of the state granted franchise.

We are thus brought to a consideration of *Bankers Trust Company vs. Raton*, 258 U. S. 328, chiefly relied upon below by respondent and which, if construed as respondent desires, would stand alone and in direct conflict with the

cases above and many others which might be cited. In view of this, the case must be carefully examined. While that case appears unquestionably to have been properly decided, it has no bearing upon the present situation because of the great distinction in the facts. It appears that that case was concerned with two state acts, one of 1884 and one of 1887, and that the plaintiff was contending that under the Act of 1887 its mortgagor procured the right to use the city streets direct from the state without interference by the City. Upon the other hand, the City contended that the Act of 1887 gave the company the capacity to receive a grant from the City with power of regulation by the City, and that the Act of 1884 giving the right to the City to grant private individuals the power to construct and operate a waterworks system for a term not exceeding twenty-five years, was in harmony with the Act of 1887 and that the water company recognized that fact. The company was incorporated and a contract evidenced by an ordinance was entered into by the City and the company by which the company was to furnish water to the City for twenty-five years, and the City contracted not to operate a competing system for the same period. The twenty-five year period expired in 1916. In 1912 and 1913 the City took steps to build its own system and expended better than $30,000 in so doing.

In the first place, it appears from the opinion that the Supreme Court of New Mexico (22 N. M., 464, 174 Pac. 423), had previously held that the franchise of the water company was derived from the City, which fact obviously formed a large part of the basis for the decision. In fact it appears from the report in 22 N. M. 464 that the Raton Waterworks Co. in its bill of complaint based its claim on a franchise by ordinance of the City of Raton. This, of course, is directly in contrast with the case at bar, in view

of the fact that the Supreme Court of Ohio had repeatedly held prior to 1925 that electric light and power companies, and other corporations in the same category incorporated between 1887 and 1896, took their franchises directly from the state, municipalities not having the power to grant them during that period.

In the second place, in the Raton case the city's franchise was granted directly to the waterworks company and accepted by it. In our case the attempted grant of the Norwalk ordinance was directly to the predecessor partnership. The successor corporations *acquired their franchises from the state* and then succeeded by assignment to such rights as the partnership had without waiving their state granted rights, as we have shown. The city in the case at bar had no power to grant a franchise to the corporations, it made no such attempt and no such grant was accepted by the predecessor corporations, all of which is exactly contrary to the situation in the Raton case.

In the third place, the city of Raton acted seasonably before the expiration of the 25 year franchise to notify the company to get off the streets at the end of that period. The city there went on to expend money upon the assumption that the right of the waterworks company would expire at the end of the period, while the company stood by without making any claim to perpetual rights, thus laying the basis for an equitable estoppel, which is not present in the case at bar, where the city at no time took any action upon the basis that the company's rights expired either in 1910 or 1915. Instead the City of Norwalk waited more than fifteen years after the 1890 ordinance expired and instead of there being an estoppel against this plaintiff, very clearly the city is now estopped to assert any rights under the 1890 ordinance. We think the District Court properly disposed of defendant's contentions based on the Raton

case by pointing out that "none of the 'conventional elements' of equitable estoppel are present here". (R. 233).

Furthermore, the City of Raton did nothing to recognize the rights of the waterworks company, whereas, in our case, the City of Norwalk by its ordinance of 1924 and the application thereof by its officials to the Ohio Electric Power Company, defined a modified mode of use of its streets by that company which has been uniformly observed.

That the mere granting of a non-exclusive franchise does not constitute conduct raising an estoppel in favor of the city see *Macklin v. Home Telephone Co.*, 1 O. C. C. (N. S.) 373, 383. (Affirmed, 70 O. S. 507).

That the Raton case depends upon a true estoppel is illustrated by *Central Power Co. v. Central City*, 282 Fed. 998 (C. C. A. 8), where it was followed and applied. In that case the city had dismantled its plant upon the faith of a contract with the company. Quite properly, the company was held to be estopped from questioning the validity of the contract.

The conduct of the City of Norwalk has been entirely out of accord with the position it now takes. No action whatsoever was taken against the predecessor company in 1910 or 1915. It was neither requested to remove from the city nor to comply with new regulations. After the expiration in the fall of 1915 of the street lighting contract of 1905, current was furnished for street lighting upon the request of the city officials until the municipal plant was put in operation. Even after the construction of the municipal plant the city at no time prior to 1926 questioned the right of the company to use the streets and during all of that period imposed various regulations. Clearly the city never expended any money or took any action upon the assumption that the company's rights expired in 1910 or even in 1915.

And it cannot well be said that the companies did not operate in reliance upon a claim of right to use the streets by virtue of the state franchises. What better claim of right exists than the continuous open user by plaintiff's mortgagor and its predecessors? The conduct of the various companies exhibited an understanding that their rights were not dependent on the Ordinance of 1890. Concrete evidence of this is the letter of Mr. Craig (now one of counsel for the respondent City), written in 1917, but *then* acting as attorney for the then operating company. That letter certainly is not indicative of any surrender of rights by the company. . (Plaintiff's Ex. 77, R. 480).

Nor did the respondent plead any estoppel against the petitioner in this case.

4. The Franchise Rights of Plaintiff's Mortgagor Are Not Impaired or Affected by the Act of April 21, 1896.

Section 3471a, R. S. 1890 was amended by the Act of April 21, 1896 (92 O. L. 204). The original section was preserved, making the provisions of the telegraph section applicable to electric companies, except Sec. 3461, and with the following proviso:

> "* * * Provided, however, that in order to subject the same to municipal control alone no person or company shall place, string, construct, or maintain any line * * * through any street, alley, lane, square, place or land of any city, village or town, without the consent of such municipality. * * *"

The real question presented is as to the effect of this amendment of 1896 upon the perpetual rights to use the streets conferred directly by the state upon the predecessor companies organized in 1891 and 1895. Were previously granted rights thereby destroyed and subsequent use of the streets made subject to the sole control of the munici-

pality, and, if so, was such legislation by the State of Ohio in harmony with the Federal Constitution?

On this we take the position, first, that the amendment properly construed does not apply so as to authorize or permit any impairment of rights previously granted; second, that if it does, it violates the Federal Constitution.

(a) The Statute Was Prospective in its Operation.

The statute says that no company *shall* construct or maintain a line. This language clearly suggests that only future construction was contemplated, and there is nothing in the statute expressly making it applicable to companies already occupying the streets. It is well settled that statutes are not to be given a restrospective interpretation unless it is absolutely required. *Cameron v. United States*, 231 U. S. 710, 720.

The Act of 1896 has been so construed by the Ohio Supreme Court. *Ohio Public Service Co. vs. State*, Ex *Rel, Fritz*, 113 O. S. 325:

> "The rights acquired by the Orrville Light, Heat, & Power Company from the state in 1893, under Sections 3454 and 3471a, Revised Statutes, could not be annulled or revoked by the Village of Orrville, nor by the state of Ohio, after the passage of the amendment of 1896." (p. 337)

To the same effect see: *State vs. Iowa Telephone Co.*, 175 Iowa 607, 154 N. W. 678, and Michigan Telephone Co. vs. Benton Harbor, 121 Mich. 512, 80 N. W. 386.

Respondent sought to avoid this construction below by relying upon the language of Mr. Justice Clarke in *Hardin-Wyandot Lighting Co. vs. Upper Sandusky*, 251 U. S. 173, where, in discussing the Act of 1896, he says that it was,

> "* * * a general one, applicable to all electric lighting companies then operating, or which might thereafter operate, in the state." (P. 178).

However, Mr. Justice Clarke's remarks must be limited to the subject which he was discussing. He expressly points out that the right of the company to maintain its equipment for commercial purposes was not involved. He made it clear that he considered the statute as relating only to the exercise of police power by the municipality, rather than as conferring the absolute power to grant or withhold the right to use the streets. This is clear from his statement at page 178 of the opinion, that,

> "* * * all that it did was to give to the municipal authorities complete control over the placing in the streets of poles and wires for conducting electricity for lighting and power purposes, instead of the like control which they had when the franchise was granted, but subject to resort to the Probate Court in case of disagreement with the company as to the 'mode' of using the streets.
>
> "We cannot doubt that the danger to life and property from wires carrying high tension electric current through village streets is so great that the subject is a proper one for regulation by the exercise of the police power and very certainly the authorities of the municipality immediately interested in the safety and welfare of its citizens are a proper agency to have charge of such regulation. Any modification of its rights which the company may suffer from this law passed *in a reasonable exercise of the police power* does not constitute an impairing of the obligation of its contract with the State or village and is not a taking of its property without due process of law within the meaning of the constitutional prohibition. Northern Pacific Ry. Co. v. Puget Sound & Willapa Harbor Ry. Co., 250 U. S. 332, and cases cited." (Italics ours).

Justice Clarke did not say that the statute conferred upon the municipality the right to *deny* the use of the streets to one having a vested right to the use thereof.

Even if the Act of 1896 is meant to apply to companies then operating, we submit it was meant to accomplish nothing more than to confer complete power of regulation upon the municipalities without the interference of the probate court. This is the construction given the statute by Mr. Justice Clarke, as pointed out above and is preferable to any construction making the statute unconstitutional.

This construction finds adequate support from:

Wisconsin Telephone Company vs. Oshkosh, 62 Wis. 32, 21 N. W. 828.

Michigan Telephone Co. vs. Benton Harbor, 121 Mich. 512, 80 N. W., 386.

(b) Construed Otherwise the Statute is Unconstitional.

If neither of the foregoing views as to the construction of this Act is correct, and it does attempt to confer upon the City complete power to terminate and destroy pre-existing rights to use the streets in the City of Norwalk under state granted franchises, we then say that the statute is clearly unconstitutional.

The rights conferred upon The Incandescent Light & Power Company and The Northern Electric Company by their incorporation in 1891 and 1895 were unlimited as to time. Under the settled rule applied by the United States Supreme Court to Ohio franchises coming into existence during this period, perpetual franchises came into being.

Northern Ohio Traction Co. vs. Ohio, 245 U. S. 574.

Ohio Public Service Co.. vs. Ohio, Ex Rel. Fritz, 274 U. S. 12.

We quote the following from the latter case:

"Louisville vs. Cumberland Telephone Co., 224

> U. S. 649, 661, and Owensboro v. Cumberland Telephone Co., 230 U. S. 58, 75, are enough to show that the rights acquired under the ordinance of 1892 were assignable without further consent by the village. *If to enforce the Ohio statute of* 1896 *would destroy this right, it conflicts with the provision of the federal Constitution—No State shall pass any law impairing the obligation of contracts.*" (P. 14) (Italics ours).

A state having granted a perpetual right to use the streets of a municipality cannot by later legislation make this right of use subject to municipal consent. This exact point was decided in the case of *Russell vs. Sebastian,* 233 U. S. 195, where the constitutional provision under which the gas company had acquired a state franchise in the city streets was amended substantially as the Ohio act of 1896 amended that of 1887. The Court not only held that the city could not oust the present system but also that under the original constitutional grant the company was entitled to extend its system.

An interpretation of the Act of 1896, which would permit the city to terminate the franchise rights, cannot be sustained as an exercise of the right to alter or repeal laws relative to the formation of corporations reserved in Ohio Constitution Article XIII, Section 2. The vested right to use the streets is a property right, *Louisville vs. Cumberland Telephone Co.*, 224 U. S. 649, 661, which the legislature cannot destroy under the guise of exercising the right to alter or repeal; *Detroit vs. D. & H. Plank-Road Co.*, 43 Mich. 140, 5 N. W. 275, where it was said:

> "A statute which could have this effect would not be a statute to amend franchises, but a statute to confiscate property; it would not be a statute of regulation, but of spoliation." (5 N. W. 281)

That case was cited and followed by the *Ohio Supreme Court in Ohio vs. Neff*, 52 O. S. 375 and in *Lansing vs. Michigan Power Company*, 183 Mich. 400, 150 N. W. 250.

See also:

Shields v. Ohio, 95 U. S. 324.

Detroit v. Plank-Road Co., 43 Mich. 140.

Orr v. Bracken Co., 81 Ky. Rep. 593.

People v. O'Brien, 111 N. Y. 1, 18 N. E. 692.

Iowa Telephone Co. v. Keokuk, 226 Fed. 82.

Ohio Constitution, Article I, Section 2, prohibits the grant of irrepealable special privileges. A non-exclusive franchise does not come within this section. See *Old Colony Trust Company vs. Omaha*, 230 U. S. 100, which quotes from *Plattsmouth vs. Nebraska Telephone Company*, 80 Neb. 460, 464, 465, 114 N. W. 588 as follows:

> "'* * * A special privilege in constitutional law is a right, power, franchise, immunity or privilege granted to, or vested in, a person or class of persons to the exclusion of others and in derogation of common right. * * * Ordinance No. 91 does not attempt to confer upon the defendant any exclusive right or franchise, and leaves it open for the city, at any time, to extend to other companies or corporations the same privileges awarded to the defendant. The contention, therefore, that ordinance No. 91 is void and confers no right upon the defendant cannot be sustained.'" (pp. 464, 465).

Finally as the District Court pointed out (Memorandum Opinion Footnote, R. 231), this record exhibits no attempt by the state of Ohio to exercise the reserve power with reference to the rights of petitioner's mortgagor or its predecessors.

5. The Franchises Acquired by the Predecessors of Plaintiff's Mortgagor Are Assignable.

Respondent claimed below that the franchises herein involved were non-assignable and thus that the franchise rights never passed to petitioner's mortgagor. Any such claim is without merit for at least three reasons:

In the first place, these franchises were and are assignable under the decisions of this court.

Louisville v. Cumberland Tel. Co., 224 U. S. 649, 661.

Owensboro v. Cumberland Tel. Co., 230 U. S. 58, 75.

Ohio Public Service Co. v. Ohio, ex rel., 274 U. S. 12, 14.

It is of no consequence that the rights of the Incandescent Light & Power Company were transferred to individuals for a short period in 1895. This is true because identical rights were secured upon the incorporation of the Northern Electric Company a short time thereafter, and also because of the recognized rule that the transfer of a franchise to an individual who serves merely as a conduit of title does not violate any rule holding that franchises can be exercised only by corporations.

Parker v. Elmyra C. & N. R. Co., 165 N. Y. 274, 59 N. E. 81.

In re *Long Acre Light & Power Co.*, 102 N. Y. S. 242.

It can make no difference that the title was held by Victor Emanuel for a short period of time in 1924. Here again the individual served only as a conduit and transferred the property to his own company, the Ohio Electric Power Company.

Furthermore, the Ohio statutes in effect in 1924 permitted the exercise of public utility franchises by an indi-

vidual as well as a corporation. See Ohio General Code, Sec. 614-2, 614-2a. And in accordance with Section 614-60 the transfer to Mr. Emanuel was approved by the Ohio Public Utilities Commission (Plaintiff's Exhibit 15, R. 333). The State of Ohio having originally granted the franchises and subsequently authorized the transfer to an individual, we fail to see how it can be argued that the transfer was ineffective.

In the second place, state granted franchises are involved. This being true, the respondent certainly has no right to question the validity of the assignment of contract rights, it not having been a party to the contract.

Blair vs. Chicago, 201 U. S. 400, 450.

Minersville vs. Schuylkill Electric Railway Company, 205 Pa. 402, 54 Atl. 1053.

In the third place, respondent is estopped by its conduct from questioning the validity of these assignments. The most recent one was made in 1924 and others were made as early as 1895. Prior to 1926 the City not only stood by, not questioning the validity of these assignments and allowing the various assignees to maintain and improve the system, pay taxes and expend large sums of money, but dealt contractually with various ones of the successive assignees. That these facts constitute an estoppel, see *Louisville vs. Cumberland Telephone Company*, 224 U. S. 649, 662; *People vs. Union Gas Company*, 254 Ill. 395, 98 N. E. 768; *E. Tenn. Telephone Company vs. Board of Councilmen*, 141 Ky. 588, 133 S. W. 564.

6. The Street Lighting Contract of 1905 Did Not Terminate the Rights of the Predecessors of Plaintiff's Mortgagor.

It is one of respondent's claims that the street lighting contract entered into in 1905 between the City and The

Cleveland & Southwestern Traction Company, one of the predecessors of the Ohio Electric Power Company, expressly limited the rights of that company in the streets and public places of Norwalk so as to terminate all its rights on August 31, 1915, and that hence the Ohio Electric Power Company does not have any perpetual franchise rights.

A careful consideration of the terms of the contract in question will demonstrate that it neither operated as a limitation imposed by the City upon the right of the predecessors of the Ohio Electric Power Company to occupy the streets and public places of the City, nor did it operate to divest any perpetual franchise rights theretofore acquired by predecessors of the Ohio Electric Power Company.

The contract of April 13, 1905, between the City of Norwalk and The Cleveland & Southwestern Traction Company is set forth at pages 541-551, of the record.

The contract of 1905 did not purport to deal with the franchise to occupy and use the streets of Norwalk for commercial light and power purposes. The subject and the only subject of the contract of 1905 was street lighting. This is shown upon the face of the contract in Section 1, the pertinent portion of which reads as follows:

> "1. The contractor shall erect and install adequate and necessary generating plant and machinery, overhead distributing system and buildings and shall furnish all labor, materials, apparatus, fuel, renewals, repairs and other things necessary for and incident to the successful supply of street lighting service as herein specified. That said street lighting service shall consist of the maintenance and operation, for the full term of ten years beginning on the first day of September, A. D. 1905, of 100 or more arc lights of the kind and description hereinafter designated * * *". (R. 541)

Section 10 of the contract gave the city the right to use the company's poles for fire alarm and police patrol boxes, etc.

We now come to Section 14 of the contract upon which the contention is based that the contract had the effect of terminating the company's franchise. Section 14 is as follows:

> "14. Said contractor shall have the right to the reasonable and necessary use and occupation of the streets and other public places in said city for the purpose of erecting, operating and maintaining its *said* lamps, wires, poles and apparatus, but in *such* use of *said* streets, alleys and other public places said contractor shall be under the control of said city, and shall obey all reasonable and proper restrictions and limitations imposed by said city upon *said* use, provided, however, that nothing herein contained shall warrant the construction that said city may by such restrictions and limitations impair the obligation of this contract or prevent said contractor from carrying out the same, and provided further that nothing *herein contained* shall permit said use or occupation of *said* streets, alleys and other public places after the expiration of this contract, to-wit: August 31, 1915, or shall prevent the said city from revoking said contractor's right to the use of said streets, alleys and other public places, for any reason for which a forfeiture may be declared against said contractor, or its assigns *hereunder*, or from revoking the grant of *said* rights for non-user or mis-user thereof through failure of said contractor or assigns to furnish such street, commercial and residence lighting to the said city, and the residents and inhabitants thereof, or otherwise.
>
> "The said contractor, at the expiration of this contract, shall upon request of the said city, remove all poles, posts, lamps, wires and other apparatus or material of every kind and description from the

> streets, alleys and other public places in said city, and restore said streets, alleys and other public places to as good a condition, as the same may be at the time of such removal, and in default thereof after thirty days' notice from said city the same may be done by said city or its agents and said contractor shall pay to said city all costs and expenses thereby incurred." (R. 548) (Italics ours).

Now obviously to us the use in Section 14 of the language "its said lamps, wires, poles and apparatus", "such use of said streets, etc.", "nothing herein contained shall permit said use or occupation of said streets, etc. * * * after the expiration of this contract, to-wit: August 31, 1915", "or shall prevent the said city from revoking said contractor's right to the use of said streets * * *" "or from revoking the grant of said rights for non-user or mis-user", indicates that the reference in each of the quoted phrases was to the use and the right to use the streets by the company for the sole and only purpose of street lighting. True it is that the second paragraph of Section 14 the Company agrees at the expiration of the contract, *upon the request of the City,* to remove all equipment of every kind from the streets, etc., but to construe this agreement as a renunciation of the franchise rights acquired in 1891 and 1895 seems to us to do violence to all principles of contract construction. At no place in the contract is the company's franchise to use the streets for commercial light and power purposes touched upon, and it is inconceivable to us that the contract should be construed as an abandonment by the Company in 1915 of its perpetual franchise rights in the streets without an express stipulation to that effect. (This was Mr. Craig's view in 1917, see his letter. Plaintiff's Exhibit 77, R. 488-9). This conclusion is reinforced by a perusal of the contract, which shows that it was an ordi-

nary straight out and out contract for municipal street lighting, and that it conferred no such special and wonderful benefits upon the Company as to warrant the interpretation that in return therefor the Company was to surrender its perpetual franchise upon the termination of the contract. As a matter of law any such interpretation would render the contract invalid as an illegal attempt by the City to exact compensation for the use of its streets in violation of Section 3461, Rev. Stat. 1890. *Farmer v. Columbiana County Telephone Company*, 72 O. S. 526.

A circumstance which to us has some significance is the fact that in 1905, under the Act of October 22nd, 1902, Sec. 45 Gen. Code of Ohio, Sec. 3809) 96 O. L. 20, then in effect, a city could not enter into a contract for street lighting for a period in excess of ten years.

Certainly the foregoing explains why the contract of 1905 was limited to ten years, and while the fact of this limitation is not at all controlling in interpreting the contract, it does show the reason for the limitation of ten years, and thus operates to deprive of any effect whatever the argument that the limitation was imposed for any other purpose.

That the contract had nothing to do with commercial lighting equipment was recognized by the Supreme Court of Ohio in the quo warranto case, 121 O. S., 235, at page 238 in explicit language.

That court further said with reference to the 1905 contract in the following sentence, which first refers to the so-called municipally granted franchise of 1890:

> "* * * That franchise by its own terms expired in 1910, and every right of the predecessor of the defendant to occupy said streets, or any part thereof,

> ceased on August 31, 1915, under the clear and express terms of its contract above recited, and it could not thereafter convey something which it no longer possessed." (p. 240).

By this language, we submit, the Supreme Court of Ohio merely meant that the so-called municipally granted franchise having expired in 1910, the last claim of any of the predecessors of the Ohio Electric Power Company to rightful occupancy of the streets for any purpose (that is under the street lighting contract of 1905) expired in 1915. It did not hold that the state granted franchises being still in force in 1915 were then terminated *by the effect of* the *street lighting contract,* which effect must be given to it if it is to constitute a defense to our claim as to the existence of a perpetual franchise derived from the State of Ohio.

As if the foregoing considerations were not amply sufficient to dispose of the argument based on the 1905 contract, as pointed out by the District Court, (Memorandum opinion R. 235), an even more conclusive reason for holding that the 1905 contract does not affect the rights of the petitioner exists in the language of the contract, Section 14:

> "The said contractor, at the expiration of this contract, shall *upon request of the said city,* remove all poles, etc. * * *" (Italics ours).

This gave to the city an option. The company was not required to remove unless requested to do so. The right of the city was to make definite request "at the expiration of this contract," and when the city did not do so then or

within a reasonable time thereafter, it waived any such right by delaying any request until the passage of the ordinance, of March 23, 1926, even if that ordinance could be considered a request referable to the contract. 13 C. J. 630. Page on Contracts, Vol. 4, p. 3553 and p. 3646. Williston on Contracts, Section 853. This is especially true in view of the passage of the regulatory ordinance by the city in 1924 (Plaintiff's Exhibit 38, R. 438) and the company's compliance with the City's orders issued thereunder. (Plaintiff's Exs. 51-61, 63, R. 457-67; R. 128-130).

Counsel for the respondent below sought to avoid the force of this fatal omission by the city by claiming that the ordinance and resolutions of the City Council (Plaintiff's Exs. 41, 42 and 445, R. 44, 445, 449), and particularly the ordinance of March 23, 1926, had reference to the contract. These ordinances, however, not only came too late, but would not support any such claim if they had been seasonably adopted. As clearly pointed out by Judge Hahn, the gist of the ordinances and of the petition in quo warranto was that the Ohio Electric Power Company was using franchise rights not granted it by lawful authority and without the consent and authority of the state or the City of Norwalk. None of these resolutions having contained any reference to the 1905 contract, and nothing else having been done by the city to satisfy the requirement as to request, it is plain that the city is now estopped from relying upon any provisions in the contract for termination of the franchises under the well-known rule of *Railroad Company vs. McCarthy*, 96 U. S. 258:

> "Where a party gives a reason for his conduct and decision touching anything involved in a con-

troversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law." (pp. 267, 268).

It was further suggested by respondent that the rule of this case did not apply in view of the exception stated in *Spitzer vs. Board of Trustees*, 267 Fed., 121, 128, because there was no prejudice to the plaintiff. The plain answer to that suggestion is that if the city had taken the position in 1915, or at any time before 1925, that the company then operating the system had no right to be there, because it had contracted to get off the streets, it is evident that neither the Ohio Electric Power Company would have purchased the properties, nor would any of the bondholders represented by plaintiff have purchased the bonds. Further still, if the city in 1924 had undertaken not to regulate the operations of the company, but had passed an ordinance saying the company had no business on the streets because it had contracted to give up its state granted rights to be there, it follows very clearly that nobody would have purchased either the properties or the bonds until that question had been litigated.

Coming to 1926, when the City Council passed the various muster resolutions in the form it did without making any reference to the 1905 contract, it is only reasonable to conclude that there would have been a radical change in the attitude of either the Ohio Electric Power Company or the bondholders, or both. The bondholders and the company were entitled to take the City at its word. That is, they were entitled to come before the trial court

secure in the belief that the City was basing its rights not upon a contract to surrender a state granted franchise, but that there never was, or at least that there was not in 1926 and thereafter, either a state granted, or city granted franchise, as the resolutions stated. Hence, we are confident that the limited rule of the McCarthy case applies, and that the city having stood by watching the properties change hands, the mortgaging thereof, and the sale of bonds, will not be heard to say in a court of equity after the lapse of fifteen years, that it can come forward and cut off the company's rights upon the strength of anything contained in the 1905 lighting contract.

F.

CONCLUSION

We submit that the decision of the Circuit Court of Appeals in holding that the injunction granted by the District Court is within the inhibition of Judicial Code Section 265, misconstrues the order of the District Court and erroneously limits the power and authority of the federal courts to give relief against unconscionable use by the respondent City of the state court quo warranto judgment. The action of the court below in ordering petitioner's bill dismissed without passing upon the questions as to the franchises and petitioner's lien, if permitted to stand, will result in the total destruction of the bondholders' security in Norwalk. As the record shows, there was ample evidence before the District Court of such threatened destruction both by self-help on the part of the city and of an intention to make use of the quo warranto decree. Since the authorities demonstrate that petitioner's mortgagor has

not merely a present continuing right to occupy the streets, alleys and public places of the respondent City with its poles and equipment for the distribution of electricity to private users, but has such right in perpetuity, we submit that the opinion and order of the District Court are indeed conservative. The decree of the Circuit Court of Appeals should be reversed and that of the District Court should be affirmed.

Respectfully submitted,

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